No. 97-7521-CFH Title: Lesley Lee Gosch, Petitioner
v.
CAPITAL CASE Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division

Docketed:
January 15, 1998 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jan 15 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 14, 1998)
	Jan 15 1998	Application (A97-511) for a stay of execution of sentence of death, submitted to Justice Scalia.
	Jan 15 1998	Brief of respondent in opposition filed.
	Jan 15 1998	Supplemental brief of petitioner filed.
	Jan 15 1998	Application (A97-511) referred to the Court by Justice Scalia.
	Jan 15 1998	Application (A97-511) granted by the Court.
	Jan 29 1998	DISTRIBUTED. February 20, 1998
	Feb 23 1998	Petition DENIED. Statement by Justice Souter with whom Justice Stevens, Justice Ginsburg and Justice Breyer join. (Detached opinion.)

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EDITOR'S NOTE:

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No. 97-7521 (A-511)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

RECEIVED
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SUPREME COURT, U.S.

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE:
Mr. Gosch is scheduled to be executed January 15, 1998, at 6:00 p.m.

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QUESTIONS PRESENTED

1. Whether Congress' enactment of the Antiterrorism and Effective Death Penalty Act of 1996 preempts the State of Texas from setting an execution date that abbreviates the statute of limitations period and expedites the process of federal habeas review of a capital petitioner's first federal habeas petition?

2. Whether the State of Texas can circumvent Congress' explicit decree that only states that provide adequate post-conviction procedures and representation are entitled to expedited review of a death-sentenced prisoner's first federal habeas petition, simply by setting an execution date that accomplishes the same end?

3. Whether the State of Texas denies capital habeas petitioners their constitutional due process right of access to the courts by scheduling execution dates prior to initiation or completion of non-successive federal habeas proceedings?

4. Whether a state forfeits its right to carry out a death sentence if state officials, acting with deliberate indifference or malice, subject a condemned inmate to various types of extreme psychological torture, including preparations for repeated unnecessary execution dates, during his eleven-year stay on death row?

5. The federal district court denied petitioner's request for an evidentiary hearing, thereby preventing him from developing his factual allegations of unconstitutional punishment, and held that those allegations, even if true, did not constitute a violation of the Eighth and Fourteenth Amendments. Should this Court grant certiorari, vacate the decision of the court below, and remand for a full and fair evidentiary hearing?

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Collins v. Byrd, 114 S.Ct. 1288 (1994) 24

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Cordova v. Collins, 953 F.2d 167 (5th Cir. 1992) 9

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Jurek v. Texas, 428 U.S. 262 (1976) 14, 28

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Murray v. Giarratano, 492 U.S. 1 (1989) 21

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3 WLR 995, 143 NLJ 1639 (Nov. 2, 1993) 25, 26, 32, 33, 34, 35, 36, 38

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
P.L. 103-236, § 506 (to be codified at 18 U.S.C.A. §§ 2340-2340B) 36

1990 Human Rights Report on Ethiopia, Kuwait, Liberia, and Sudan (February 1991). 36

1991 Human Rights Report on South Africa, Turkey, and Kuwait (February 1992) 36

1993 Human Rights Report on Chad, Sudan, Moldova, Liberia, and Colombia (February 1994) 36

ADDITIONAL AUTHORITIES

American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus, 40 Amer. U. L. Rev. 1, 138 (1990) 10

Mark Ballard, Death Penalty System Ridiculed, *Texas Lawyer*, 11 May 1992 10

Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, & David L. Shapiro, Hart & Wechler's The Federal Courts and the Federal System 4 n.17 (3rd ed. 1988). 19

Albert Camus, REFLECTIONS ON THE GUILLOTINE 27-30 (Richard Howard, trans., Fridtjof-Karla Publications 1959). 37

Stephen Chapman, NICARAGUA, CUBA: TYRANNY EMERGING AND ESTABLISHED, THE CHICAGO TRIBUNE, July 20, 1986 36

George Esper, *For POW, Coming Home Meant Pain*, CHICAGO TRIBUNE, July 6, 1993, at C8 36

Joseph Frank, DOSTOYEVSKY: THE YEARS OF ORDEAL 50-58 (1983) 37

Michael R. Gordon, *Iraqi War Crimes Asserted by U.S.*, THE NEW YORK TIMES, Mar. 20, 1993 36

Stephen Hudak, *Terry Anderson Escapes Hate, Too*, THE PLAIN DEALER, Nov. 20, 1992, at 1B 36

Edith Jones, Death Penalty Procedures, 53 *Texas Bar Journal* 850 (1990) 10

Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal at 6 (Aug. 23, 1989) 15

Marquart, Ekland-Olsen & Sorensen, THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990 (1994). 35

Barrett Prettyman, *Death and the Supreme Court* 125-26 (1961) 31

Alexander Solzhenitsyn, 1 THE GULAG ARCHIPELAGO 448 (Thomas Whitney, trans. 1971). 37

David Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, NOVA L. REV. (Spring 1991). 36

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Lesley Lee Gosch prays that this Honorable Court stay his imminent execution, and grant a writ of certiorari to review the substantial issues raised herein and to review the judgment of the United States Court of Appeals for the Fifth Circuit. Mr. Gosch, who is currently confined on death row in the Texas Department of Criminal Justice, Institutional Division, believes that his appeal has merit and raises substantial federal questions of immense importance to the federal courts' habeas corpus jurisprudence that require the attention of this Court.

CITATION TO OPINION BELOW

As of this writing, Petitioner's Application for a Certificate of Probable Cause and Motion for Stay of Execution remain pending before the United States Court of Appeals for the Fifth Circuit. The unpublished order of the district court denying Mr. Gosch's Motion for Stay of Execution is attached as **Appendix A**. The unpublished order of the district court ordering Mr. Gosch to file a habeas petition by December 30, 1997 is attached as **Appendix B**. The unpublished order of the district court denying Mr. Gosch's "Motion for Reconsideration of Denial of Motion for Stay of Execution and the [Filing] Deadlines Established by This Court's December 17, 1997 Scheduling Order" is attached as **Appendix C**. The unpublished order of the district court denying Mr. Gosch's Petition for Writ of Habeas Corpus is attached as **Appendix D**.

JURISDICTION

Mr. Gosch invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1366, 2241; the Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291, 2253. As he did below, Mr. Gosch asserts the deprivation of rights secured by the United States Constitution and 28 U.S.C. §§2241-2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. art. I, §9, ¶2; art. VI, ¶2; Amend. VIII and XIV.

This case also involves 28 U.S.C. §§2241-2266, which has been attached as **Appendix E**.

STATEMENT OF THE CASE

A. Prior Proceedings

Mr. Gosch is incarcerated for an offense that occurred in August 1985. He was indicted in the 226th District Court of Bexar County. After the trial court granted defense counsel's motion for a change of venue, the trial was subsequently moved to the 24th District Court of Victoria County.

On September 2, 1986, Mr. Gosch was convicted of capital murder. Two days later, on September 4, 1986, the jury returned affirmative answers to the two special issues presented, and Mr. Gosch was sentenced to death.

On December 18, 1991, Mr. Gosch's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals. *Gosch v. State*, 829 S.W.2d 775 (Tex. Crim. App. 1991). A petition for writ of certiorari was timely filed, and was subsequently denied by the United States Supreme Court on June 28, 1993.

At a hearing on July 16, 1993, the 226th District Court of Bexar County set an execution date for September 16, 1993. At that hearing, Eden Harrington, Executive Director of the now-defunct Texas Resource Center, advised the Court that Mr. Gosch was unrepresented by counsel and that it was unlikely that counsel could be recruited for him to file a state habeas petition if the execution date was set just sixty days away.

By September 9, 1993, volunteer counsel had still not been located to represent Mr. Gosch. Accordingly, Ms. Harrington that day filed a motion for a stay of execution with the Texas Court of Criminal Appeals. The motion stated that Mr. Gosch had no counsel, and requested a stay so that the Resource Center could be given time to recruit counsel for him. The Court of Criminal Appeals denied the motion on September 13, 1993.

Later that day, pursuant to the practice then insisted upon by the Attorney General of Texas, *see McFarland v. Texas*, 512 U.S. 849, 852 n.1 (1994), the Texas Resource Center filed

on behalf of Mr. Gosch a perfunctory federal habeas petition raising only one exhausted issue in the United States District Court for the Western District of Texas. The petition and papers filed along with it made clear that the Resource Center could not represent Mr. Gosch, and that it was filing the petition on his behalf solely for the purpose of invoking the federal district court's jurisdiction under the federal habeas corpus statute in order for a stay to be granted, counsel to be appointed, and for Mr. Gosch to have the opportunity to file thereafter a properly investigated habeas petition presenting all available claims for habeas relief.[1] Pursuant to past practice, the Attorney General agreed to the entry of an order staying Mr. Gosch's execution upon the filing of his petition. *Id.* Notwithstanding this presentation to the district court, on September 15, 1993, the court denied the stay and the petition on the merits and *sua sponte* appointed Ms. Harrington as Mr. Gosch's postconviction counsel.

Over the next few short hours, a state habeas corpus application raising several claims adapted from other cases was hurriedly pieced together and filed on behalf of Mr. Gosch in the 226th District Court of Bexar County. The district court recommended denial of the claims, and the Court of Criminal Appeals accepted the recommendation and denied the habeas application during the evening of September 16, 1993.

With Mr. Gosch's execution only hours away, the Resource Center then filed a second habeas petition in the United States District Court for the Western District of Texas on behalf of Mr. Gosch raising these additional claims. These papers, too, made clear that because Mr. Gosch had previously been unrepresented, he had not had the opportunity to determine, with the assistance of counsel, whether there were constitutional defects underlying his conviction and death sentence that were not apparent from the trial record or that were apparent but, because of

[1] The Resource Center informed the court that the petition did not reflect any legal research, transcript review, or other development of Mr. Gosch's claims for relief, but merely asserted a single claim that had been raised in his direct appeal.

ineffective assistance of counsel at trial or on direct appeal, were not raised. The federal district court granted a stay of execution with respect to this petition on September 16, 1993, approximately one half hour before Mr. Gosch was scheduled to be executed. However, on October 13, 1993, the court dismissed the petition on the ground that the United States District Court for the Western District lacked subject matter jurisdiction. Attorneys for the State appealed that decision to the Fifth Circuit. Shortly thereafter, the State successfully sought another execution date for Mr. Gosch, for April 15, 1994

On April 6, 1994, both of Mr. Gosch's federal habeas petitions were dismissed by order of the United States Court of Appeals for the Fifth Circuit on the ground that "jurisdiction for habeas corpus petitions for Petitioner Gosch lies only in the United States District Court for the Southern District of Texas." *Gosch v. Collins*, Nos. 93-8635, 93-8780 (5th Cir. April 6, 1994) (unpublished order).

On April 7, 1994, less than one day after the Fifth Circuit's order, undersigned counsel and Edward Shaughnessy of the Bexar County Criminal District Attorney's Office agreed to a proposed scheduling order that would provide for the orderly litigation of claims raised in a subsequently filed state postconviction application. Mr. Shaughnessy would not agree to a stay of execution until the application had been filed.

On April 12, 1994, Mr. Gosch timely filed an application for a postconviction writ of habeas corpus. At that time, Mr. Shaughnessy requested and the state district court stayed Mr. Gosch's execution date that was scheduled for three days hence.

After seeking and being granted leave to do so by the state court, on October 14, 1994, Mr. Gosch also timely filed a supplemental and amended application for a postconviction writ of habeas corpus.

On June 5-7, 1995, the 226th District Court conducted an evidentiary hearing that centered on the allegations raised in Mr. Gosch's supplemental application. Thereafter, the

district court ordered both parties to submit proposed findings of fact and conclusions of law by July 28, 1995. On June 28, 1995, Mr. Gosch timely filed his proposed findings of fact and conclusions of law.[2] On May 14, 1997, the 226th District Court entered an order setting forth its proposed findings of fact and conclusions of law.

On June 3, 1997, Petitioner requested and received 30 days within which to file objections and/or a motion for submission with the Court of Criminal Appeals. On July 3, 1997, Petitioner timely filed a motion for submission. On September 10, 1997, the Court of Criminal Appeals entered an order denying habeas corpus relief.

After the Court of Criminal Appeals entered its decision denying state postconviction relief, counsel for Mr. Gosch contacted Ed Shaughnessy, Chief of the Appeals Division of the Bexar County Criminal District Attorney's Office, and received oral assurances that the State would not seek to set an execution date in Mr. Gosch's case prior to the conclusion of federal habeas corpus proceedings. However, on September 24, 1997, counsel for Mr. Gosch called Mr. Shaughnessy to discover that, in fact, a hearing in the 226th District Court had been set for Monday, October 6, 1997 for the purpose of setting an execution date.[3]

On October 2, 1997, Mr. Gosch filed a motion with the district court requesting that the court not set an execution date so that Mr. Gosch could initiate federal proceedings without the exigency of an outstanding execution date, arguing that an execution date was both unnecessary and deleterious to fair consideration of his claims in the federal courts. At the October 8, 1997 hearing, counsel for Mr. Gosch again requested that the state court not set an execution date until Mr. Gosch had had the opportunity to seek federal habeas corpus relief under the provisions of the recently enacted Antiterrorism and Effective Death Penalty Act of 1996. The district court

[2] To undersigned counsel's knowledge, the district court never ruled on the State's motion for extension of time, and the State never filed any proposed findings of fact and conclusions of law.

[3] Due to scheduling conflicts, the date setting hearing was actually held on October 8, 1997.

denied Mr. Gosch's motion and set an execution date for January 15, 1998.

On November 20, 1997, Mr. Gosch filed a motion for stay of execution with the Texas Court of Criminal Appeals, which was denied on November 21, 1997.

On December 8, 1997, Mr. Gosch filed a motion for stay of execution with the District Court for the Southern District of Texas, Victoria Division, which was denied on December 16, 1997. On December 17, 1997, the District Court entered a scheduling order in light of the present execution date requiring that Mr. Gosch file his petition for writ of habeas corpus on or before December 30, 1997. Petitioner filed a motion for reconsideration of the District Court's denial of motion for stay of execution and of the entry of the scheduling order on December 19, 1997, which was denied that same day.

In compliance with the Court's order, Mr. Gosch filed his first federal petition for writ of habeas corpus, as well a a motion for stay of execution, on December 30, 1997. The Director's response was filed on January 6, 1998, and on January 12, 1998, at approximately 6:00 p.m., Petitioner received via facsimile a copy of the District Court order denying relief, entering final judgment, and denying Petitioner's motion for stay of execution.

On January 13, 1998, via facsimile transmission, Petitioner filed an Application for Certificate of Appealability with the District Court, which was denied on January 14, 1998. That same day, having just discovered a meritorious issue that is currently under consideration by this Court, *see Buchanan v. Angelone*, No. 96-8400, *cert. granted*, ___ U.S. ___, 117 S.Ct. 1551 (1997), Petitioner filed a Motion to Alter or Amend Judgment. The District Court denied Petitioner's Motion at approximately 8:00 p.m. tonight (January 14, 1998). Mr. Gosch immediately filed a Notice of Appeal, a Certificate of Appealability, and a Motion for Stay of Execution with the United States Court of Appeals for the Fifth Circuit, which remain pending with the Court of Appeals as of this writing.

B. How the Issues Were Raised and Decided in the Courts below

On December 8, 1997, Petitioner filed a Motion for Stay of Execution in federal district court, seeking a stay of his currently scheduled January 15, 1998 execution date, in which he argued that Texas' practice of setting execution dates before the initiation or conclusion of non-successive federal habeas corpus review contravenes Congress' intent in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and unconstitutionally limits death-sentenced inmates' access to the federal courts. On December 16, 1997, the District Court denied the motion for stay of execution and held that the limitation period of the Antiterrorism and Effective Death Penalty Act merely establishes an outer limit for the filing of an initial petition for writ of habeas corpus, and evinces Congress' intent that the time limitations found therein have no impact on decisions to stay executions. On December 17, 1997, the District Court entered a Scheduling Order requiring Mr. Gosch to file a federal habeas petition by December 30, 1997.

On December 19, 1997, Mr. Gosch filed a motion for reconsideration of the District Court's orders denying a stay of execution and establishing a deadline for the filing of a habeas corpus petition. Mr. Gosch argued that the State's authority to set an execution date before the initiation or completion of non-successive federal habeas corpus proceedings was preempted by Congress' enactment of the AEDPA, and therefore contravened the Supremacy Clause and the federal preemption doctrine. That same day, the District Court denied Mr. Gosch's motion for reconsideration, reiterating the court's disagreement with Mr. Gosch's construction of the AEDPA but failing to address Mr. Gosch's Supremacy Clause preemption arguments.

On December 30, 1997, Mr. Gosch filed his Petition for Writ of Habeas Corpus, in which he alleged that the State's repeated scheduling of execution dates for the purpose of expediting postconviction review gave rise to an independent violation of the Eighth Amendment. On January 12, 1998, the District Court denied Mr. Gosch habeas corpus relief on his Eighth

Amendment claim on the ground that it was (1) not cognizable on habeas review because "he is not challenging the validity of his conviction or sentence;" and (2) meritless, as "[n]o court has recognized repeated execution settings as cruel and unusual punishment." *See* Appendix C at 38-39.

On January 14, 1998, Mr. Gosch raised all of these arguments again in the United States Court of Appeals for the Fifth Circuit in an Application for Certificate of Appealability and a Motion for Stay of Execution, which remain pending before the Court of Appeals at the time of this writing.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

SUMMARY OF THE ARGUMENT

Alone among the jurisdictions in the nation that carry out the death penalty, the State of Texas schedules execution dates for death row inmates who are seeking federal habeas corpus relief for the first time in order to expedite the process of postconviction review. In essence, the imposition of these execution dates has dictated the deadline for filing the petition for writ of habeas corpus and, in some cases, the full timeframe for the adjudication of the capital petitioner's federal constitutional claims for relief. In some cases, the result has been that the entire process of federal habeas corpus review begins and ends in a matter of days, or even hours.[4]

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[4] *See, e.g., Black v. Collins*, 962 F.2d 394, 398 (5th Cir. 1992) (on April 7, 1992, state trial court sets execution date for May 22, 1992; on May 12, 1992, Texas Court of Criminal Appeals denies state habeas relief; on May 19, 1992, the federal district court denies federal habeas petition; on May 21, 1992, the Fifth Circuit denies certificate of probable cause; on May 22, 1992, petitioner is executed); *White v. Collins*, 959 F.2d 1319, 1321 (5th Cir. 1992) (on April 5, 1992, petitioner files first federal habeas corpus petition; on April 15, 1992, district court denies petition; on April 21, 1992, the Fifth Circuit denies certificate of probable cause; on April 23, 1992, execution occurs; *Cordova v. Collins*, 953 F.2d 167, 169 (5th Cir. 1992) (on January 17, 1992, petitioner files first federal habeas petition in federal district court; on January 19, 1992, the district court denies petition; on January 21, 1992, the Fifth Circuit denies certificate of probable

(continued...)

By setting execution dates in death penalty cases before a petition for habeas corpus has even been filed, Texas has successfully forced federal district courts and the Fifth Circuit to set abbreviated, accelerated filing schedules that place tremendous burdens not only on the petitioner's counsel but on the court itself.[5] The entire process of litigating, investigating, and deciding death penalty cases under such exigent conditions breeds error and inaccuracy in the process of review. The flurry of appeals that invevitably ensues makes careful presentation of the issues impossible, and allows factual mistakes or legal errors that could be corrected or addressed under more reasonable conditions to find their way into the final decision.

Considered as a whole, the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") manifests congressional intent to establish a comprehensive statutory scheme designed to promote fair, orderly, and reasonably expeditious procedures for the filing and adjudication of federal habeas corpus petitions. As a review of the legislative record makes clear, Congress' adoption of a statute of limitations reflects an attempt to accomodate the State's interest in seeing that federal habeas proceedings are initiated in an expeditious manner

[4](...continued)
cause; on January 22, 1992, execution takes place); *Green v. Collins*, 947 F.2d 1230, 1231 (5th Cir. 1991) (on November 6, 1991, first federal habeas petition filed; on November 8, 1991, federal district court denies relief; on November 9, 1991, Fifth Circuit denies certificate of probable cause; on November 12, 1991, execution occurs).

[5] Texas' practice of forcing death row inmates to initiate their habeas appeals by setting execution dates has received a great deal of highly warranted criticism. Fifth Circuit Judge Thomas Reavley has described the State of Texas's use of execution dates to drive cases through the federal courts as vaudevillian. *See* Mark Ballard, "Death Penalty System Ridiculed," *Texas Lawyer*, 11 May 1992, at 4. Similarly, Fifth Circuit Judge Edith Jones has decried the State's effort to impose docket "control by execution date." *See* Edith Jones, Death Penalty Procedures, 53 *Texas Bar Journal* 850, 851 (1990). Even a former leading Harris County death penalty prosecutor has conceded that "jump-starting" habeas review "makes a chaotic mess out of the system of administering . . . capital habeas cases in Texas." *See* American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus, reprinted in 40 Amer. U. L. Rev. 1, 138 (1990) (remarks of then-Harris County Assistant District Attorney Caprice Cosper).

and the habeas petitioner's interest in having a reasonable period of time to prepare a federal habeas petition before filing it.[6] By enacting statutory periods for the filing and adjudication of federal habeas petitions, the AEDPA reveals Congress' desire to regulate the State's exercise of its date-setting authority to dictate, control, and manipulate the process of federal review.

Nonetheless, despite Congress' enactment of the AEDPA, the State of Texas continues to insist on holding the reins on the process of federal habeas review in capital cases, assigning itself the authority to determine when petitions will be filed and decided through the scheduling of execution dates. Texas' persistent efforts to truncate the federal courts' review of capital cases are particularly galling because Congress explicitly conditioned the availability of expedited procedures and favorable standards of review set forth in Chapter 154 of the Act as a *quid pro quo* to those states that provide indigent death row inmates with the basic tools of adequate process in state post-conviction proceedings: the right to the appointment of a competent lawyer who is afforded reasonable compensation. As the Fifth Circuit has held, the State of Texas has not fulfilled its part of the bargain, and therefore does not qualify for these expedited procedures. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996) (holding that Texas does not qualify as an "opt-in" state), *vacated and remanded on other grounds*, 105 F.3d 209 (5th Cir. 1997). Nonetheless, Texas' seeks the windfall of these benefits by setting of execution dates rather than by improving its state post-conviction process. Indeed, the State's setting of Mr. Gosch's execution date actually resulted in the federal district court and the court of appeals having *less* time to decide the case than the opt-in procedures would have permitted. *See* 28 U.S.C. § 2266(c)(1) (allowing Courts of Appeals no longer than 120 days to render a final decision after

[6] *See, e.g.*, 141 CONG. REC. S7805 (Daily Ed. June 7, 1995) ("I think we have set forth here a timetable which is realistic and reasonable, and a structure which will make the death penalty a meaningful deterrent, cutting back the time from some 20 years, in extreme cases, to a reasonable timeframe which can be done with fairness to all parties in the course of some 2 years.") (Statement of Senator Specter, co-sponsor)

the filing of the reply or answer).

Thus, Texas continues to apply pressure to the federal courts to expedite its process of review. As Mr. Gosch demonstrates in this petition, the State's date-setting practice not only presents an impediment to full and fair federal habeas review, but also abrogates the principles of federalism and interferes with a capital habeas petitioner's access to the courts. In light of the enactment of the AEDPA, the State's continued insistence that it be able to dictate the pace of federal habeas corpus review in capital cases presents an unwarranted intrusion into a field preempted by congressional action and protected by the supremacy clause of the Constitution. This Court should grant certiorari to bar the State from encroaching on the process of federal habeas corpus review and the constitutionally protected processes of the federal courts.

Finally, because of the unusual circumstances surrounding the State's attempt to implement capital punishment in this case, Mr. Gosch maintains that the State of Texas has forfeited its right to execute Lesley Lee Gosch under the Eighth and Fourteenth Amendments. This forfeiture has resulted from the State's *unnecessary* setting of repeated execution dates in this case.

On three separate occasions since Mr. Gosch's death sentence was imposed, the State of Texas has scheduled execution dates before one full and fair process of state and federal postconviction habeas corpus review had been completed. In September 1993, Mr. Gosch came within 15 minutes of execution before a stay was granted -- he was informed of the stay just moments after being told that it was time to be escorted into the execution chamber -- even though, for all practical purposes, he was unrepresented by counsel at the time and had never previously sought state or federal postconviction review. In April 1994, Mr. Gosch came within just three days of a second scheduled execution date, despite the fact that he had still not been afforded an opportunity to file a properly researched and investigated habeas corpus petition, and had instead been forced to file "perfunctory" petitions simply in order to obtain a stay of

execution. Finally, an execution date has been pending in this case since October, even though this is the first time that Mr. Gosch has petitioned this Court for the Great Writ.

All three execution dates scheduled in this case were set by the trial court at the instigation of the State of Texas solely in order to force Mr. Gosch to initiate his habeas corpus appeals in state and federal court. It is widely understood by members of the bench and bar in Texas -- although not understood by death row inmates facing such execution dates -- that in the overwhelming majority of Texas capital cases, such premature execution dates will not result in an actual execution.[7]

The repeated execution dates that have been scheduled in this case have caused Mr. Gosch an incalculable amount of psychological anguish and pain. On each occasion, Mr. Gosch has been forced to contemplate his impending death as the date for execution drew nearer, and then has been forced to endure it again when the State next desired to expedite the process of postconviction review. The sustained stress and anxiety that Mr. Gosch has been subjected to while on death row have taken an extreme toll on Mr. Gosch's spiritual well-being and mental health.

Because of the unusual circumstances surrounding the State's attempt to implement capital punishment in this case, the State of Texas has forfeited its right to execute Lesley Lee Gosch under the Eighth and Fourteenth Amendments. This forfeiture has resulted from the State's *unnecessary* setting of repeated execution dates in this case. While the execution of a prisoner

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[7] Petitioner does not dispute that the state has a legitimate interest in seeing that habeas corpus appeals are pursued efficiently by death row inmates; however, considerably less cruel methods are available to assure that habeas corpus appeals are pursued by death row inmates in an efficient manner than Texas' preferred method of setting execution dates. For instance, Texas courts could informally set filing deadlines, which could be enforced with the threat of setting an execution date in the event that such appeals were not timely filed. In fact, undersigned counsel for Mr. Gosch specifically proposed this course of action as a way to initiate the federal postconviction process; the State, however, opted to set an execution date instead.

pursuant to a constitutionally-obtained death sentence is not cruel and unusual punishment *per se*, *see, e.g., Jurek v. Texas*, 428 U.S. 262 (1976), it has long been recognized that *the manner of its imposition* may violate the Eighth Amendment to the United States Constitution.

In Texas, the repeated setting of execution dates has become part and parcel of the State's imposition of the death penalty. It is this practice that Mr. Gosch contends is unconstitutional, as it improperly exploits the unique nature of the capital sentence to hasten judicial review and subjects the condemned to an additional measure of punishment that, in circumstances such as those presented by this case, amounts to nothing less than a thinly disguised form of psychological torture.[8]

I

THE STATE OF TEXAS' ABILITY TO SET EXECUTION DATES THAT UPSET AND INTERFERE WITH ORDERLY FEDERAL HABEAS PROCEEDINGS AS ENVISIONED BY ENACTMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 IS BARRED BY THE SUPREMACY CLAUSE AND THE FEDERAL PREEMPTION DOCTRINE

All parties can agree that the State of Texas has an interest in finality in death penalty cases. Indeed, this Court and the federal judiciary and federal legislature routinely give great deference to the orders and decisions of the state courts. However, federalism is a two-way street, and creates "a system in which there is sensitivity to the legitimate interests of *both* the State and National Governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971) (emphasis added).

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[8] Although Mr. Gosch's case presents a clear example of the unconstitutional cruelty of the State's practice of setting premature execution dates, other Texas death row inmates have been subjected to equally outrageous treatment, or even worse. For example, according to a review of scheduled execution date lists made available by the Texas Department of Criminal Justice, Texas death row inmate Javier Suarez Medina has faced at least 13 execution dates over the past three and a half years, and has been under an execution date continuously over that period.

In the current case, the demands of federalism side not with the State's interest in finality, but with the federal government's interest in full and fair proceedings to review a capital habeas petitioner's federal constitutional claims for relief.

A. Congress Has Preempted the State's Ability to Execute Mr. Gosch at this Juncture

The Government's interest in full and fair habeas proceedings has been distilled to mean, in the capital habeas corpus context, affording a capital habeas petitioner one "fair shot" at all avenues of relief. This is what this Court has long understood and what Congress finally settled on in enacting the Antiterrorism and Effective Death Penalty Act of 1996.[9]

1. The current federal time limitations

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), Pub. L. 104-132, 110 Stat. 1214. Title I of the AEDPA, entitled "Habeas Corpus Reform," amends the existing habeas corpus procedures contained in 28 U.S.C. §§ 2241-2255. Section 107 of the AEDPA, entitled "Death Penalty Litigation Procedures," adds new sections 2261-2266 to Title 28.

For the purposes of this stay litigation, the critical aspects of the AEDPA are the Congressionally mandated time limitations on federal habeas petitions found either in the new §2244(d)("[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"); or in the new §2261 *et seq.*, which, under certain "opt-in" procedures, allows States who meet certain procedural and

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[9] As a committee appointed by Chief Justice Rehnquist and chaired by retired Justice Powell stated in its report proposing reforms to the federal habeas corpus process (most of which were enacted into law by the AEDPA): "***Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution***, and with the assistance of competent counsel for the defendant." Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal at 6 (Aug. 23, 1989) (emphasis added).

appointed counsel requirements to shorten the one-year time limitation in capital cases to a six-month time limitation. *See* §2263.

The foreshortened time period of six months (as opposed to the normal one year) applies only in states that "opt-in" to a system of procedural and substantive benefits in federal habeas corpus proceedings through improved state counsel provisions and improved state court proceedings. The advantages are significant to the states that opt-in and include a six-month statute of limitations period on the filing of federal habeas petitions (28 U.S.C. §2263), limitations on amendments to petitions (28 U.S.C. §2266), and restrictions on factual development of the claims within the petition and on the federal court's power to review the merits of the claims (28 U.S.C. §2264).

The provisions of Chapter 154 (§2261 *et seq.*) also impose strict limitation periods within which federal courts must decide petitions. The district courts must give priority to capital habeas petitions over all non-capital matters, 28 U.S.C. § 2266(a), and "render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed." 28 U.S.C. § 2266(b)(1)(A). The opt-in provisions limit the consideration by United States Courts of Appeal to no longer than 120 days after the latter of the filing of the reply brief or answering brief. 28 U.S.C. § 2266(c)(1).

States may qualify for opt-in status if they have implemented either of two distinct habeas procedures: (1) the "post-conviction" procedure codified in §2261, or (2) the "unitary review" procedure codified in §2265.[10] The opt-in provisions of AEDPA create "a *quid pro quo* arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 23, 104th Cong., 1st Sess., at

[10] in Texas, which is not a unitary system, only the provisions of §2261 are relevant.

16.

Despite all the benefits it would receive, Texas is ***not*** an "opt-in" jurisdiction because the State has failed to satisfy the counsel requirements of §2265. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996) ("Texas has failed to comply fully with § 2265's requirements"), *vacated and remanded on other grounds*, 105 F.3d 209 (5th Cir. 1997). The consequences of Texas' failure to supply even the minimally competent counsel required by Congress to death sentenced inmates in state post-conviction proceedings is that the State may not expect -- or demand -- expedited procedures in the United States District Court or the United States Court of Appeals for the Fifth Circuit. Thus, the State's setting of Mr. Gosch's current execution date is an obvious attempt to circumvent Congress' explicit decree that only states that provide adequate post-conviction proceedings and representation are entitled to expedited federal review.

When it enacted the AEDPA, Congress considered and determined the appropriate balance between the State's interest in the finality of its judgments and a petitioner's interest in receiving full and fair consideration of his claims for relief in federal court. The time limitations on federal court adjudication contained in the AEDPA indicate Congress' decision on what constitutes a proper limitation on federal court consideration of petitions for writ of habeas corpus. This statement functions as a preemptive statute regarding the pendency and speed of federal habeas corpus petitions by inmates in state custody. In short, federal law preempts the State of Texas in this case from shortening or eliminating Mr. Gosch's right to federal habeas review by setting premature execution dates, such as the currently pending date set for January 15, 1998.

2. These time limits preempt states from carrying out execution dates until non-successive federal habeas corpus proceedings have concluded

The federal law of preemption is often a complicated matter. However, in this, a case involving the management and control of the federal courts, the doctrine's applicability is plain:

Congress and the federal courts have spoken on the appropriate time limitations that habeas petitioners must observe, and no state is free to alter such limits by the fabricated crisis of execution date litigation.

In light of the sometimes competing interests of the state and federal sovereigns, the framers created the constitutional answer:

> The Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land.

CONST. ART. VI. The preemption doctrine necessarily follows from this constitutional clause -- if state and federal law are in conflict, there must be resolution, and that resolution always favors the federal sovereign.

In *Gade v. National Solid Waste Management Association*, 505 U.S. 88 (1992), this Court summarized the constitutional test for determining whether a federal law preempts a state law or action:

> Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit preemptive language, we have recognized at least two types of implied preemption: field preemption, where the scheme of the federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 98 (citations omitted). *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-204 (1983); *Pennsylvania v. Nelson*, 350 U.S. 497, 503-505 (1956).

In the instant case, there is no express preemption in the various statutes of Congress and rules of procedure governing the federal courts. However, there is an abundant basis supporting field preemption and conflict preemption.

Field preemption exists when federal law should exclusively occupy an entire field. There certainly is no place where such field preemption is more appropriate than in the regulation of the federal court system. Indeed, Article III of the Constitution, which defines the federal courts and their powers, was a radical departure from the constitutional precursor in the Articles of Confederacy.[11] Article III vests the federal judicial power "in one supreme Court and in such inferior courts as Congress may from time to time ordain and establish." Therefore, textually, this Court is a constitutional creation, whereas all other federal courts and all federal court procedures are the products of Congress. Only the federal executive branch and the federal legislature are so wholly a product of the federal system. There can be no doubt that Congress and the federal courts themselves are the only bodies which might effect the control, procedures, and dockets of the federal judicial system. Any other system would create cross-sovereign chaos. There is no place in this field for state interference. Because of this seemingly simple principle, this Court, and other federal courts, must heed the preemption doctrine and the supremacy clause and prevent state actions from interfering with important federal court functions.

The execution date set in this case is a perfect example of state interference in a completely preempted field. Not only was the execution date set in the state trial court at the State's initiative, but the state district court refused to stop this interference by issuing a stay even though the State did not dispute that Mr. Gosch had not had "one fair shot" at federal review.

Congress has not given the reins of power over to the states to control the federal judiciary. To the contrary, Congress has spoken on these issues by setting a one year time limitation on federal habeas petitioners, and the federal courts have spoken on these issues

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[11] The only federal court allowed by the Articles of Confederacy was the Court of Appeals in Cases of Capture, which existed mostly to resolve admiralty seizure disputes. Indeed, there was no permanent forum for the resolution of disputes between the States. *See generally* Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, & David L. Shapiro, Hart & Wechler's The Federal Courts and the Federal System 4 n.17 (3rd ed. 1988).

through the Federal Rules of Appellate Procedure and through their local rules which set out time lines and specific expedited deadlines in capital habeas proceedings. Indeed, the field is entirely occupied and therefore preempted. The State in this circumstance should be prevented from exercising control over the mechanisms of the federal judiciary.

Likewise, conflict preemption precludes the State of Texas from carrying out the imminent execution of Lesley Lee Gosch. Conflict preemption may be found in cases in which there is a direct conflict of responsibilities under state and federal law. *See, e.g., McDermott v. Wisconsin*, 288 U.S. 115 (1915)(compliance with both state and federal law is an impossibility). However, conflict preemption may also occur where the state law impedes or interferes with a federal legislative goal. *See Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967)(preemption precludes states from denying unemployment benefits for filing an unfair labor practice complaint); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state action preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

In the instant case, Congress has spoken clearly as to its goals and intentions. Along with providing for the orderly progress of cases through the federal courts, which is accomplished through the rules of procedure, Congress has specifically indicated its dual goals in habeas corpus proceedings: To insure one fair shot by a federal habeas petitioner at review through the federal system; and, second, to encourage states through a "carrot" approach to provide minimally competent counsel to death-sentenced inmates in state post-conviction proceedings. Currently, the State of Texas fails to supply the latter and would deny Mr. Gosch the former. Texas has failed to qualify for the Congressionally offered "opt-in" inducements, and now seeks even more favorable treatment from the federal courts by manufacturing crisis litigation through execution date settings. The doctrine of conflict preemption prevents the state from so acting and requires this Court to issue an immediate stay of execution. It would be a dire system indeed which

allowed the states to regularly interfere so blatantly with the goals and functionings of the federal judiciary.

II

THE STATE'S PRACTICE OF SETTING EXECUTION DATES TO HASTEN FEDERAL HABEAS REVIEW UNCONSTITUTIONALLY DENIES CAPITAL HABEAS PETITIONERS THE RIGHT TO ACCESS TO THE COURTS

The State's scheduling of execution dates to "jumpstart" litigation has not only been preempted by federal action, but also engenders "crisis" litigation that violates a habeas petitioner's due process right to have one full and fair shot in the federal courts for consideration of the merits of his claim without interference from the State.

A prisoner has a federal due process right to have his constitutional claims considered fully by a federal court. For over half a century the Supreme Court has forbidden state procedures which interfere with a habeas applicant's access to federal courts. *See Ex parte Hull*, 312 U.S. 546 (1941). The Due Process Clause assures access to the courts for the purpose of presenting those courts with claims of fundamental constitutional violations. *Wolff v. McDonald*, 418 U.S. 539 (1974); *see also Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986) (locating right of court access in 1st and 14th amendments); *Nordgren v. Milliken*, 762 F.2d 851 (10th Cir. 1985) (locating right of court access in Article IV's privilege and immunities clause as well as 1st and 14th amendments); *Milhouse v. Carlson*, 652 F.2d 371 (3d Cir. 1981) (locating court access right in 1st amendment's petition clause). The principle established by *Hull* -- that a state may not abridge or impair a petitioner's right of access to a federal court for the purpose of seeking habeas review -- surely implies that the state cannot interfere with the federal court's consideration of the petitioner's claims once the petitioner has been afforded court access and has lodged his petition in the federal courts. *Hull*, 312 U.S. at 549. Meaningful access to the courts must mean that the

Court will conduct a *bona fide* consideration of a petitioner's claims which will be made without distorting interference from state actors. *See generally Bounds v. Smith*, 430 U.S. 817 (1977); *cf. Murray v. Giarratano*, 492 U.S. 1 (1989) (reiterating correctness of *Bounds* while holding that right of access does not include right to counsel).

The State's Fourteenth Amendment obligation is to permit the petitioner "an adequate opportunity to present his claims fairly." *Bounds*, 430 U.S. at 823 (quoting *Ross v. Moffitt*, 417 U.S. 600, 611 (1974)). As the Supreme Court has previously recognized, a petitioner does not have a right to have a federal court issue a stay of execution while an appeal is pending. *Barefoot v. Estelle*, 463 U.S. at 887-895. Nevertheless, *Barefoot* neither addresses nor resolves the issue of whether the state may by design utilize an execution date for the sole purpose of pushing a case through the federal courts.[12]

This stay litigation occurs during Mr. Gosch's first federal habeas application; his petition is neither successive nor abusive. This is not a case, in other words, where a federal court had previously examined the legitimacy of Mr. Gosch's death sentence and was asked again under the threat of an impending execution date to examine it again. Moreover, Mr. Gosch has never taken any steps purposefully designed to cause delay. Indeed, all previous filings by Mr. Gosch were under imminent execution orders. The length of time that this case has been in the state system was not the consequence of dilatory tactics by Mr. Gosch but rather was occasioned by the time necessary for the lower court to consider his claims.

Nevertheless, the State has manifestly sought to compel the federal courts to judge this case hastily and without adequate consideration of the legal claims asserted. The State is

[12] Aside from not addressing the question here raised by Mr. Gosch, *Barefoot* cannot control Gosch's claim for two additional reasons. First, *Barefoot* involved a successive petition, and successive petitions raise a distinct set of concerns not present in this case. *See Barefoot*, 463 U.S. at 895 ("Second and successive federal habeas corpus petitions present a different issue."). Second, the Fifth Circuit in *Barefoot* gave the petitioner's arguments plenary consideration, even holding unlimited oral argument.

currently using an execution date in an effort to thwart the orderly and rational consideration of Mr. Gosch's claims.[13] Such execution litigation leaves little time for careful thought regarding the merits of the claims Mr. Gosch has presented -- either by courts or by undersigned counsel.

The potentially chaotic conditions created by Texas' practice of setting execution dates to hasten postconviction review have already been illustrated by the prior proceedings in this case. In April 1994, Mr. Gosch came within half an hour of being executed, despite the fact that he was without a lawyer to represent him in state or federal habeas proceedings.[14] The petitions he was forced to file -- simply to obtain a stay under the pre-*McFarland* regime -- were perfunctory and never professed to reflect the results of a reasonable examination of the facts of the case or the legality of Mr. Gosch's confinement or death sentence. In fact, the frenzy created by the State's practice of setting execution dates in this case resulted in the erroneous filing of the petition in the wrong federal district, engendering confusion, collateral litigation, and error.

The federal courts have on occasion been critical of lawyers for death row inmates who wait until the eleventh hour before filing their appeals. Indeed, Judge Jones of the Fifth Circuit Court of Appeals has lambasted attorneys for "playing chicken" with the federal courts by waiting until the final moment before filing claims on behalf of condemned prisoners. *See, e.g., Bell v.*

[13] Moreover, there are indications that the State's effort has been successful: in the past two weeks, undersigned counsel has been in conversations with concerned and impatient clerks from the Federal District Court and the United States Court of Appeals for the Fifth Circuit.

[14] Despite the fact that the District Court for the Western District appointed Ms. Harrington to represent Mr. Gosch in April 1994, the denial of a stay left her with two days or less to file a petition. The Supreme Court's decision in *McFarland* makes clear that the appointment of an attorney under such exigent circumstances cannot be said to have satisfied Mr. Gosch's federal statutory right to counsel. *See McFarland*, 512 U.S. at 857-58 (appointment of counsel on the eve of an execution date "would have been meaningless" unless the execution was stayed; "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims.").

Lynaugh, 858 F.2d 978, 986 (5th Cir.), *cert. denied*, 492 U.S. 925 (1988).[15] The eleventh hour, however, is a relative thing, and in the instant case, the eleventh hour was thrust upon this Court and Mr. Gosch by the Respondent in this case. The consequence has been to deny Mr. Gosch a meaningful opportunity to avail himself of his statutory right to federal habeas corpus review. This Court should grant certiorari to examine whether the State of Texas' maverick execution-date setting practices violated death-sentenced inmates' right to meaningful access to the courts.

III

THE EXECUTION OF A DEATH SENTENCE AFTER SUBJECTING PETITIONER TO REPEATED, UNNECESSARY EXECUTION DATES THAT WERE SCHEDULED SIMPLY TO HASTEN THE PROCESS OF HABEAS CORPUS REVIEW ITSELF CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

A. Introduction

Finally, this case presents this Court with the opportunity to address important Eighth Amendment issues of first impression in the modern era. The last time this Court was faced with a case of this sort was 1947. *See State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). In *Francis*, a Louisiana death row inmate was subjected to a botched electrocution that failed to terminate his life. In a subsequent state habeas corpus action quite similar to Mr. Gosch's habeas appeal, Francis unsuccessfully argued that the State had forfeited its right to make a second attempt at executing him.

A plurality of this Court rejected Francis' claim on the ground that he had failed to prove

[15] Similar criticism has come from Justices on the United States Supreme Court. *See, e.g., Collins v. Byrd*, 114 S.Ct. 1288 (1994) (Scalia, J.); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

that Louisiana officials acted deliberately or maliciously in the unsuccessful effort to electrocute him. *See id.* at 464 ("Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. ... The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution."); *id.* at 462 ("As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the [execution] warrant in a careful and humane manner.").

Justice Frankfurter's concurrence agreed that Louisiana's "innocent misadventure" did not violate the Constitution, but left open the question of whether "a single cruelly willful" unsuccessful execution attempt would forfeit the state's right to make a second attempt. *See id.* at 471-72. Four Justices dissented in *Francis* and argued that the case should be remanded to the state courts so that a factual determination could be made about the circumstances of the unsuccessful execution attempt. Those four Justices believed that, if what Francis claimed was true, "then the State must find some means of disposing of this case [other than execution] that will not violate th[e] Constitution," even if the botched execution was an unintended mistake on the part of state officials. *Id.* at 481.

This Court's Eighth Amendment jurisprudence has significantly evolved in the five decades since *Francis*. Furthermore, in recent years, numerous courts in other countries have addressed claims similar to the one raised herein. In particular, the Privy Council of Great Britain in late 1993 issued its landmark decision in *Pratt & Morgan v. Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993*, 3 WLR 995, 143 NLJ 1639 (Nov. 2, 1993) (reprinted in 14

HUM. RTS. L. J. 338). In *Pratt*, a unanimous Privy Council, sitting *en banc* for the first time in decades, held that an otherwise valid death sentence could not be carried out when the government has kept a condemned person on death row for an extended period of time and has subjected him to repeated execution dates.

Petitioner contends that the State of Texas has forfeited its right to execute him under the Eighth and Fourteenth Amendments because of the deliberate indifference of various state actors towards his extreme mental and emotional suffering during the last decade.[16] In particular, Petitioner challenges the State and state courts' *unnecessary* setting of repeated execution dates over Petitioner's objection.

Such deliberate indifference of various state actors towards Mr. Gosch's mental and emotional suffering amounts to a form of unconstitutional torture. Accordingly, because the imposition of a death sentence -- and, indeed, the State's continued placement of Mr. Gosch on Texas' death row -- would be cruel and unusual punishment under the Eighth and Fourteenth Amendments, this Court must permanently vacate Petitioner's death sentence and order him removed from death row. At the very least, this Court should remand for an evidentiary hearing in the Texas courts in order to permit Petitioner to establish the truth of his allegations, which were not controverted by Respondent in the lower courts.

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[16] It is well-established that an Eighth Amendment violation may be predicated on "deliberate indifference" by state actors to an inmate's suffering. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

B. Leading Relevant Supreme Court Decisions

This Court does not write on a clean slate. There are numerous prior decisions of this Court interpreting the Eighth Amendment which shed some light on this Court's analysis.

1. General Eighth Amendment principles

The Eighth Amendment "embodies `broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted). It "expresses the revulsion of civilized man against barbarous acts -- the `cry of horror' against man's inhumanity to his fellow man." *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

The Eighth Amendment's restrictions on the ability of a state to impose certain types of punishment "aim . . . to protect the condemned from fear and pain . . . or to protect the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). At its core, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

The Amendment has traditionally been interpreted to proscribe torturous punishments, such as drawing and quartering, public dissection, and burning at the stake. *See, e.g., Wilkerson v. Utah*, 99 U.S. 130, 136 (1878). However, the Eighth Amendment is not tethered to types of punishment that were thought to be cruel and unusual at the time the Bill of Rights was adopted in the late 1700s. *See, e.g., Weems v. United States*, 217 U.S. 349, 373 (1910) ("a principle, to be vital, must be capable of wider application than the mischief which gave it birth"). Rather, the reach of the amendment has long been interpreted in a "flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. 153, 171 (1976); *see also Trop*, 356 U.S. at 100-01 (scope of the amendment

is "not static"). The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual.

Recent Eighth Amendment decisions have focused initially on whether a challenged punishment was considered unacceptable at the time of the adoption of the Bill of Rights. An affirmative answer would terminate the Eighth Amendment analysis and the punishment would be declared unconstitutional. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986). Assuming that a particular type of punishment was permitted at the time that the Bill of Rights was adopted, however, a second, more difficult question arises: whether a punishment that may have been acceptable to the Framers of the Constitution nonetheless now violates modern society's civilized standards. *See, e.g., Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (*en banc*).

Addressing this second question, courts have explained that the judicial mission here is to look to objective factors. Such factors include the practices among the majority of the states in this country and international practices. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 369 (1989); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). The latter is obviously particularly relevant in this case.

2. Eighth Amendment authority directly relevant to Petitioner's claim

The penalty of death by lethal injection is not cruel and unusual punishment *per se* under the Eighth and Fourteenth Amendments to the United States Constitution. *See, e.g., Jurek v. Texas*, 428 U.S. 262 (1976). Nor is capital punishment rendered unconstitutional when a condemned man undergoes suffering that is an unavoidable incident to the sentence of death. *See*

State ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). Nor can the condemned man complain of an increase in suffering that he himself brought on by filing last-minute appeals where no justification exists for the eleventh-hour nature of the appeal. *See, e.g., Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984). However, it has long been recognized that while the death penalty itself may not be a cruel and unusual punishment, the manner of its imposition may violate the Eighth Amendment depending on the circumstances.

This analysis turns at least in part on whether the punishment imposes unnecessary or gratuitous suffering. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), this Court held that execution by shooting did not violate the Eighth Amendment. However, the Court stated that:

> [I]t is safe to affirm that punishments of torture, such as [circumstances of terror, pain, or disgrace superadded to the penalty of death], and all others in the same line of *unnecessary cruelty*, are forbidden by that amendment to the constitution.

Id. at 136 (emphasis added). In 1890, the Court added that: "Punishments are cruel when they involve torture or a lingering death .... ["Cruel"] implies something inhuman and barbarous, -- something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890).

More recently, this Court has reaffirmed this guiding principle, and "steadfastly maintained that a penalty is unconstitutional whenever it is *unnecessarily* harsh or cruel." *Furman v. Georgia*, 408 U.S. 238, 332 (1972) (Marshall, J., concurring). To be constitutional a "punishment must not involve the *unnecessary* and wanton infliction of pain . . . the sanction imposed cannot be so totally without penological justification that it results in the *gratuitous infliction of suffering*." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (emphasis added). Thus, in the context of capital punishment -- where the infliction of some incidental pain is obviously

unavoidable -- this Court's Eighth Amendment analysis of what is "cruel and unusual" turns on whether unnecessary or gratuitous pain is part of the punishment. *Francis*, 329 U.S. 459, 463-463 (1947).

In *State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Court considered a case analogous to Mr. Gosch's case. Louisiana's initial attempt to execute Francis in the State's electric chair failed "presumably because of some mechanical difficulty." *Id.* at 460. Francis contended that to subject him to electrocution again would be cruel and unusual punishment. Justice Reed and three other Justices rejected his contention and held that:

> The traditional humanity of modern Anglo-American law forbids the infliction of *unnecessary pain* in the execution of the death sentence. Prohibition against the wanton infliction of pain has come to our law from the [English] Bill of Rights of 1688. ... Mr. Franics' suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment.... [The Constitution does not protect against] the *necessary suffering* involved in any method employed to extinguish life humanely. The fact that an *unforeseen accident* prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict *unnecessary pain* nor any *unnecessary pain* involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

Id. at 463-64 (emphasis added).

Justice Frankfurter cast the deciding vote against the death row inmate in *Francis*:

> I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence duly pronounced upon conviction for murder because a first attempt to carry it out was *an innocent misadventure*, offends a principle of justice "Rooted in the traditions and conscience of our people."

Id. at 379-80 (citations omitted) (emphasis added). However, Frankfurter added:

> The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes *a series of abortive attempts* at electrocution, *or even a single cruelly willful attempt*, would not raise different questions.

Id. at 380 (emphasis added).

Four Justices in *Francis* strongly dissented, arguing that "[t]he intent of the executioner cannot lessen the torture or excuse the result" under the Eighth Amendment. *Id.* at 382 (Burton, J., dissenting, joined by Douglas, Murphy & Rutledge, JJ.).[17]

It is self-evident that the reason the State has repeatedly scheduled execution dates in this case -- as well as in the cases of numerous other Texas death row inmates who have not completed or even initiated postconviction review -- has nothing to do with a reasonable expectation that the punishment will actually be carried out on those dates. Instead, on each occasion, the State has scheduled an execution date simply to force Mr. Gosch to file a habeas petition or to pressure the state or federal courts to hasten their review of his case. The fact that the State did not set these execution dates with a reasonable expectation that the punishment would actually be carried out is demonstrated by the fact that on every occasion in which a date has been set in this case, the State eventually took a position of non-opposition (or no position at all) on a stay of execution once Mr. Gosch had filed the habeas petition that was the object of the

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[17] The importance to the five-Justice *Francis* majority of the distinction between accidental and willful infliction of suffering can be gauged by the Court's response to subsequent litigation in the same case. Francis' lawyers filed a habeas petition with the Supreme Court when they discovered evidence that Francis' executioner had been drunk and had perhaps acted with malice toward Francis. Barrett Prettyman, *Death and the Supreme Court* 125-26 (1961). The Court denied the petition on procedural grounds, but held that, "In view of the grave nature of the new allegation set forth in this petition, the denial is expressly without prejudice to application to proper tribunals." *Francis v. Resweber*, 331 U.S. 786 (1947). Two Justices voted to grant the petition despite the procedural error. *Id.* Inexplicably, Francis never refiled the petition. Prettyman, *supra*, at 127.

State's scheduling of the execution date in the first place. Thus, the issue here is whether the State can constitutionally exploit the unique nature of a capital sentence by repeatedly setting execution dates -- not because the State has the expectation that it will actually carry out the punishment at that time -- but rather because it wishes to force the petitioner or the courts to act in order to expedite the process of postconviction review, thereby forcing the inmate to endure the needless suffering generated as the scheduled date draws near.

The State has made no demonstration that its legitimate interest in seeing that postconviction review be conducted in an expeditious manner could not have been accomplished through less drastic (and less punitive, for the Petitioner) means. At every turn, the State has rejected scheduling orders for the filing of petitions, choosing instead to schedule premature execution dates. Thus, Mr. Gosch contends that it is fundamentally cruel and unusual punishment for the State of Texas to take advantage of the unique nature of the death penalty to expedite judicial review of postconviction claims, when the same end can be accomplished through less punitive means.

C. *Pratt & Morgan*

In *Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993*, 3 WLR 995, 143 NLJ 1639 (British Commonwealth Privy Council Nov. 2, 1993) (en banc), an appeal of two condemned men on Jamaica's death row, the British Privy Council[18] held that carrying out the death sentences of the two men would be "torture" and "inhuman or degrading

[18] The Privy Council is the highest appellate court for Commonwealth nations. The judges who sit on the Privy Council are likewise members of England's highest domestic appellate court.

punishment." The British court did not hold that capital punishment was cruel and unusual *per se*, but instead focused on the fact that the men had been on death row for an extended period of time and that the men had been under imminent execution dates on three separate occasions, only to have their scheduled executions stayed shortly before the sentences were to be carried out.

> The rationale of the case was summarized in the opening paragraph:
>
> The appellants ... were arrested 16 years ago for murder. ... On 15th January 1979 they were convicted of murder and sentenced to death. ... On three occasions the death warrant has been read to [Pratt and Morgan] and they have been removed to the condemned cells immediately adjacent to the gallows. ... *The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows.*

Slip op., at 1 (emphasis added).

Although the opinion's main focus was on the sheer length of time that Pratt and Morgan were kept on death row, a significant secondary theme in the court's reasoning was that the setting of execution dates that were withdrawn and then re-set was itself inhumane and cruel. The court quoted Winston Churchill on this point:

> Mr. Winston Churchill expressed the sentiment of the House when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever the crime. That is a wrong thing.

Slip op., at 3. *Pratt & Morgan* also surveyed the history of English common law regarding the subject of lengthy imprisonment of a condemned man on death row and the repeated setting of execution dates in a single case. The English court concluded that neither practice was condoned

historically at English common law. *See id.* passim.[19]

Pratt & Morgan, along with American authorities discussed herein, offers a legal basis for an Eighth Amendment claim challenging the State's right to impose a death sentence on him.[20]

D. Mr. Gosch's Mental Anguish as a Form of Torture

Admittedly, Mr. Gosch has not been exposed to an intense electrical current or other physical punishment incident to the State's attempt to execute him. However, that is not a barrier to his Eighth Amendment claim. This Court has long recognized that mental anguish can be a form of unconstitutional torture. *See, e.g., Trop v. Dulles*, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever-increasing fear and distress"); *Rhodes v. Chapman*, 452 U.S. 337, 349 n.15 (1981) (possible psychological problems of inmates factored into Eighth Amendment analysis); *Hudson v. McMillan*, 112 U.S. 995, 1004 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment].

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[19] This Court has repeatedly held that the "cruel and unusual punishment" clause of the Eighth Amendment is informed, at least in part, by what was cruel and unusual punishment at the time that the Framers wrote the Constitution and Bill of Rights. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (in rejecting claim that the execution of 16 and 17 year olds is cruel and unusual, Court noted that the punishment was not "'one of those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted'") (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

[20] Literally hundreds of American courts and jurists have been guided by the decisions of the Privy Council, the highest expositor of law in our Mother Country, whose common law has greatly shaped our own law. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 679 (1980) (citing a Privy Council decision with approval); *Kilbourn v. Thompson*, 103 U.S. 168, 186 (1881) (same); *see also Fisher v. United States*, 328 U.S. 463, 486-88 (1946) (Frankfurter, J., dissenting) ("This Court in reviewing a conviction for murder ... ought not be behind ... the Privy Council ....") (discussing Privy Council decisions).

If anything, our precedent is to the contrary."); *Furman v. Georgia*, 408 U.S. 238, 271-3 (1972) (Brennan, J., concurring) ("[T]he Framers also knew []that there could be exercises of cruelty other than those which inflicted bodily pain or mutilation.").

The very purpose of capital punishment is enough to put the State on notice of the anguish caused by its imminent approach. To function as either deterrent or retribution, it must inspire great fear and dread. Specific proof of the State of Texas' awareness is its practice of putting condemned prisoners on constant "suicide watch" in the day or so prior to a scheduled execution. *See* Texas Department of Corrections, *Procedures for the Execution of Death-Sentenced Inmates*, ¶ V.(A), *reprinted in* Marquart, Ekland-Olsen & Sorensen, THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 236 (1994).

Justice Stevens has recognized that the mental pain suffered by a condemned prisoner awaiting execution "is . . . a significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [*i.e.*, the actual execution]." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring from the denial of certiorari). In this regard, Justice Frankfurter recognized that "[i]n the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

In *Pratt & Morgan*, the British Privy Council described the mental torture inflicted on two condemned men on Jamaica's death row:

> On three occasions the death warrant has been read to them and they have been removed to the condemned cells immediately adjacent to the gallows. . . . The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they

> have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional and psychological impact of this experience, for it only reveals that which is to be expected.

Pratt and Morgan v. Attorney General for Jamaica, 4 All ER 769, 3 WLR 995, 143 NLJ 1639 (Privy Council November 2, 1993).

Mock executions and other threats of imminent death are widely recognized to be a form of unconscionable torture. On April 30, 1994, the U.S. Congress enacted new provisions implementing the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. P.L. 103-236, § 506 (to be codified at 18 U.S.C.A. §§ 2340-2340B).[21] Under the new law, "the threat of imminent death" is defined as a form of torture. 18 U.S.C.A. § 2340(2)(C). This provision was designed to bring "mock executions" within the ambit of the legislation. David Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, NOVA L. REV. (Spring 1991). The United States Department of State recognizes mock executions to be a form of torture.[22]

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[21] The Convention has already been approved by the U.N. Security Council. The U.S. Senate gave its "advice and consent" to the President in 1990. The United States is expected to sign the treaty at any time.

[22] *See, e.g., 1993 Human Rights Report on Chad, Sudan, Moldova, Liberia, and Colombia* (February 1994); *1991 Human Rights Report on South Africa, Turkey, and Kuwait* (February 1992); *1990 Human Rights Report on Ethiopia, Kuwait, Liberia, and Sudan* (February 1991).

Countless newspaper stories and other accounts confirm that mock execution is a form of torture practiced by some of the world's worst human rights abusers. *See, e.g.*, George Esper, *For POW, Coming Home Meant Pain*, CHICAGO TRIBUNE, July 6, 1993, at C8 (American POW in Vietnam); Michael R. Gordon, *Iraqi War Crimes Asserted by U.S.*, THE NEW YORK TIMES, Mar. 20, 1993, at 1 (Kuwaiti prisoners in Iraq during the Gulf War); Stephen Hudak, *Terry Anderson Escapes Hate, Too*, THE PLAIN DEALER, Nov. 20, 1992, at 1B (hostage in Lebanon); Stephen Chapman, NICARAGUA, CUBA: TYRANNY EMERGING AND ESTABLISHED, THE CHICAGO (continued...)

Albert Camus vividly described the emotions of the condemned man in the hours before his execution:

> During the three-quarters of an hour that separates him from his extinction, the certainty of his futile death overcomes everything: the fettered, utterly submissive creature experiences a hell that makes a mockery of the one with which he is threatened. . . . This doubtless explains the strange quality of submission that is so often observed in the condemned man at the moment of his execution. . . . Confronted with an inescapable death, a man, no matter what his convictions, is devastated throughout his entire system. . . . Two deaths are imposed, and the first is worse than the second. . . . [T]he relatives of the condemned man thereby experience a misery that punishes them beyond the bounds of all justice.

Albert Camus, REFLECTIONS ON THE GUILLOTINE 27-30 (Richard Howard, trans., Fridtjof-Karla Publications 1959).

These authorities demonstrate that the prelude to an execution causes a significant amount of anguish to a condemned prisoner. Granted, no judicially sanctioned execution can be carried out without some incidental suffering to the offender. Necessarily incidental anguish that is concomitant to an otherwise lawful execution is one thing. What Mr. Gosch was *unnecessarily* subjected to is another.

F. The Need for An Evidentiary Hearing

In the courts below, Mr. Gosch's factual allegations were not specifically controverted by the State. Rather, the State contended that, assuming that the allegations were true, Mr. Gosch's Eighth Amendment claim failed as a threshold matter of law. The federal district court agreed

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[22](...continued)
TRIBUNE, July 20, 1986, at C3; *American Tells of Long Ordeal in Iran Prisons*, THE NEW YORK TIMES, Jan. 17, 1983, at A1. *See also* Joseph Frank, DOSTOYEVSKY: THE YEARS OF ORDEAL 50-58 (1983); Alexander Solzhenitsyn, 1 THE GULAG ARCHIPELAGO 448 (Thomas Whitney, trans. 1971).

and, thus, refused to conduct an evidentiary hearing.

As explained above, this Eighth Amendment claim does not fail as a matter of law. It may be quite novel,[23] but that does not mean that the facts alleged, if proved true, do not entitle Mr. Gosch to relief. In addition to the Privy Council's *Pratt* decision, such American decisions as *Francis v. Resweber, supra*, offer a jurisprudential basis for this claim. Moreover, because the federal district court denied an evidentiary hearing, the complete factual basis for this claim has not yet been fully developed. Thus, Mr. Gosch requires not only an evidentiary hearing, but also court-supervised discovery and a stay of execution so that further investigation can be accomplished.

[23] This claim is not barred under this Court's non-retroactivity doctrine, *see Teague v. Lane*, 489 U.S. 288 (1989), for two reasons: first, the factual basis for this claim did not occur until *after* Petitioner's conviction became final in early 1987; second, assuming *arguendo* that *Teague* somehow otherwise applied to this claim, because the claim alleges that Petitioner is *ineligible* for capital punishment, it falls squarely under *Teague*'s first exception. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

CONCLUSION

Petitioner Lesley Lee Gosch comes before this Court after the lower federal courts have taken all of two weeks to review the substantial constitutional claims raised in his first federal habeas petition. With all due respect, Mr. Gosch submits that such abbreviated review makes a mockery of the once Great Writ. The State of Texas has apparently mistaken Congress' efforts to establish reasonable deadlines for the adjudication of federal habeas petitions as an invitation to clear its death row as quickly as possible, regardless of whether the State frustrates Congress' carefully crafted scheme in the process. It is beyond irony that the State is only able to do so in capital cases, when the sentence itself -- death -- is used for purposes of docket control, precisely because of its finality. Mr. Gosch knows of no other litigation in which the client's legal rights can be routinely dispatched with such alacrity. It is incomprehensible that in capital cases, where the need for heightened reliability is supposedly so grave, judicial review is conducted in a manner that practically guarantees that reliability cannot be achieved at all.

Mr. Gosch regrets that the important constitutional questions raised in this petition come to this Court at such a late hour. Unfortunately, the nature of the issues make it unlikely that they will ever be raised under any less urgent circumstances. It is nonetheless incumbent upon this Court to address the issue raised. Without this Court's intervention, Texas' entirely unnecessary and inhuman practice of federal docket control by warrant will continue to make a mockery of the judicial review that we rely upon to justify imposition of the death penalty.

PRAYER FOR RELIEF

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. At the very least, this Court should stay Petitioner's imminent execution pending the disposition of this petition.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-40042

U.S. COURT OF APPEALS
FILED
JAN 15 1998
CHARLES R. FULBRUGE III
CLERK

LESLEY LEE GOSCH,

Petitioner,

versus

GARY JOHNSON, Director,
Texas Dept. of Criminal
Justice, Institutional Division,

Respondent.

Appeal from the United States District Court
for the Southern District of Texas
(CV-97-126)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that petitioner's application for Certificate of Appealability (COA) from the district court's denial of his petition for writ of habeas corpus is hereby denied and his appeal is hereby dismissed; and his petition for stay of execution is likewise denied.

Although the instant appeal, application for COA, and petition for stay of execution have just been filed in this court, this

panel has been tracking petitioner's direct and collateral appeals in state and federal court for years, most recently those in the federal district court for the Southern District of Texas, having timely received and carefully reviewed all filings of petitioner, respondent, and the district court, when and as filed. As such, we are intimately familiar with the facts and law, the arguments of the parties, and the rulings of the district court and its reasons therefor. Consequently, petitioner's eleventh hour filings in this court do not place us in a position of requiring more time than remains before petitioner's scheduled execution in which to make considered determinations and rulings on the matters now before us.

For the reasons set forth by the district court in its extensive explications in its Order filed January 12, 1998, and its subsequent rulings, we agree that the standard of review to be applied here is that set forth in 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), particularly subsections (d)(1) and (d)(2).[1] Our study of the

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[1] (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in State court proceedings. (emphasis added) (West Supp. 1997).

careful and exhaustive analysis of the district court in its ruling denying habeas relief and dismissing the petition satisfies us that petitioner's claim was "adjudicated on the merits" in State court proceedings and that the resulting decisions were not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The overwhelming evidence of guilt in this case indicates that the petitioner planned to kidnap the victim and extort a significant monetary ransom from her husband and that the petitioner murdered the victim in her home by shooting her in the head six times. No claim of factual innocence of the petitioner in this 1985 murder is even remotely suggested. All of petitioner's many claims made in these proceedings, which have dragged on for over eleven years, have been rejected — and correctly so. In this last effort for relief, we perceive the petitioner's claims to be meritless on their face.

First, the petitioner claims that his execution would violate the Eighth Amendment's prohibition against cruel and unusual punishment in light of the three previous dates the State set for carrying out the petitioner's capital sentence. The petitioner alternatively argues that the length of his stay on death row — over eleven years — constitutes cruel and unusual punishment entitling him to relief. But the petitioner's challenges under the

Eighth Amendment do not affect the validity of his conviction or sentence and they are thus not cognizable as a basis for relief under federal habeas corpus. 28 U.S.C. § 2254 (Supp. 1996). Furthermore, the relief that the petitioner seeks is barred by the principles enunciated in Teague v. Lane, 109 S.Ct. 1060, 1075 (1989).

Next, the petitioner asserts that his counsel rendered ineffective assistance during the guilt phase of his trial. Strickland v. Washington, 104 S.Ct. 2052, 2065-68 (1984). The state court correctly determined, however, that the petitioner failed to demonstrate any prejudice resulting from his counsel's allegedly deficient investigatory and trial tactics. Strickland, 104 S.Ct. At 2068 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.").

Finally, the petitioner alleges that the State elicited false testimony at the trial and knowingly allowed such testimony to stand in violation of the precepts set out in Giglio v. United States, 92 S.Ct. 763, 766 (1972), and Brady v. Maryland, 83 S.Ct. 1194, 1197 (1963). To obtain relief under Giglio, the petitioner must demonstrate (1) that the testimony was false; (2) that the government knowingly offered the false testimony; and (3) that the false testimony was material, that is, that "it is reasonably likely that the truth would have affected the outcome of the trial." Id. Without addressing whether the petitioner has established the first two prongs, he has failed totally to

demonstrate the materiality of the allegedly false testimony. Therefore, each of the petitioner's claims for relief lack any possible merit.

Petitioner's post-AEDPA petition seeking habeas relief was properly denied. Moreover, for purposes of COA, petitioner has failed to make a "substantial showing of the denial of a constitutional right," i.e., the issues presented are not debatable among jurists of reason, so petitioner has failed to justify issuance of a COA as well.

IT IS FURTHER ORDERED that, considering the foregoing denial of petitioner's application for COA, his petition for stay of execution is denied. The merits of his petitions for a writ of habeas corpus and for a stay of execution have not presented a substantial case; neither have they made a substantial showing of the denial of a federal right.

COA DENIED; APPEAL DISMISSED; STAY OF EXECUTION DENIED.

EMILIO M. GARZA, Circuit Judge, dissenting:

This matter, reviewed and decided in less than a day, is a prime example of the tail of a pending execution wagging this panel's dog.[1] Although I agree that a preliminary review of Gosch's habeas application and motion for a stay of execution suggests that it lacks merit, this court should be more reticent in deciding any death penalty case so quickly—especially one in which the merits have not been previously reviewed by an appellate court. A thorough and comprehensive review of the record, the briefs, and, in my opinion, oral argument, is required after the passage of AEDPA.

Clearly we have violated Chief Justice Rehnquist's admonition that "Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution." *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal at 6 (Aug. 23, 1989) (retired Justice Powell presiding); *cf. McFarland v. Scott*, 512 U.S. 849, 857-58 (1994) (appointment of counsel on the eve of an execution date "would have been meaningless" unless the

[1] While the majority opinion is correct that we have been tracking Gosch's direct and collateral appeals in state and federal court for several years, *see McFarland* v. Scott, 512 U.S. 849, 852 n.1 (1994) (discussing Gosch's previously filed "skeletal" habeas petition and previous Texas policy in death penalty cases), none of the panel members, to my knowledge, have reviewed the state court record or state habeas evidentiary hearing in light of issues number 2 and 3, Gosch's ineffective assistance of counsel and his false testimony claim.

execution was stayed; "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims."). This case is not frivolous. At a minimum, issues number 2 and 3—whether Gosch received ineffective assistance of counsel and whether the State knowingly permitted false testimony—require thorough review of the underlying record. *See Mercer v. Armonstrout*, 864 F.2d 1429, 1431-32 (8th Cir. 1988) ("If the petition is not frivolous on its face, *the very essence of this court's duty is to study and research the points raised*. The severity and finality of the death penalty requires the utmost diligence and scrutiny of the court. . . . No judge can digest, retain, or apply these principles to a voluminous state court record without reflective study and analysis. To suggest that a life or death decision can be made by simply reading a petition is to advocate dereliction of judicial duty.") (emphasis in original).

I would, therefore, grant the stay of execution and hold in abeyance any ruling on a COA until a thorough review of the record is performed in light of the specific issues before us.

APPENDIX A

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED
DEC 16 1997
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

LESLEY LEE GOSCH,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. V-97-126
	§	
GARY JOHNSON, Director, Texas Dept. of Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

ORDER

Pending before the Court is Petitioner's Motion for Stay of Execution (Dkt. #1). After a thorough review of the motion, responses thereto and the applicable legal authorities, the Court is of the opinion that the motion should be DENIED WITHOUT PREJUDICE.

Petitioner argues in his pre-petition motion for stay that he is entitled to a stay of execution because (1) in the absence of a stay it will be impossible for the litigants to brief the habeas petition and for the Court to consider properly the merits of Gosch's habeas petition such that he will be deprived of meaningful review; (2) Petitioner is entitled to the full one-year period of limitation for filing a petition for writ of habeas corpus, and the State's efforts to set an execution date within this period of limitation contravene Congressional intent in enacting the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"); and (3) forcing Gosch to litigate under an execution date constitutes cruel and unusual punishment.

I. PROCEDURAL HISTORY

Gosch was convicted of capital murder on September 2, 1986 in the 24th District Court of Victoria County after the case was transferred from the 226th District Court of Bexar County.

On September 4, 1986, the jury returned affirmative answers to the two special issues presented, and Gosch was sentenced to death. Gosch's conviction was affirmed on appeal to the Texas Court of Criminal Appeals on December 18, 1991 and his petition for writ of certiorari was denied on June 28, 1993. Following this process, Gosch was given his first execution date -- September 16, 1993. After a hurried round of state and federal habeas petitions and a stay granted by the United States District Court for the Western District of Texas, the United States District Court for the Western District dismissed Gosch's second federal habeas petition on the ground that the court lacked subject matter jurisdiction. The Fifth Circuit affirmed this determination on the ground that "jurisdiction for habeas corpus petitions for Petitioner Gosch lies only in the United States District Court for the Southern District of Texas." *Gosch v. Collins*, Nos. 93-8635, 93-8780 (5th Cir. April 6, 1994). After another round of state habeas petitions, which were first filed in the state district court in April 1994 and finally denied by the Court of Criminal Appeals on September 10, 1997, and another intervening scheduled execution date of April 15, 1994 (which was also stayed), petitioner Gosch has now filed in this Court a motion for stay of his execution scheduled for January 15, 1998. He has not yet filed a habeas corpus petition in this Court.

II. ANALYSIS

In reviewing an application for a stay of execution, a court must consider:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

O'Bryan v. McKaskle, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), *cert. denied*, 465 U.S. 1013 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir.

petitioner is entitled to a stay of execution to permit due consideration of the merits." 463 U.S. 880, 889 (1983) (holding, however, that a practice of deciding the merits of an appeal, when possible, together with an application for a stay, is not inconsistent with Supreme Court precedent). A stay was granted on these grounds by the Eleventh Circuit because the appeal papers from the district court's denial of petitioner's petition for writ of habeas corpus arrived one day before the scheduled execution and the court regarded it as "apparent . . . that a responsible review of the district court proceedings could not be accomplished prior to the scheduled time for execution of sentence." *Dobbert v. Strickland*, 670 F.2d 938, 940 (11th Cir. 1982) ("[U]nless the execution of sentence is stayed . . ., the issues on appeal would become moot, and defendant would never have his day in this court on Constitutional issues. Because the brief period of time between the filing of this appeal and the scheduled execution is insufficient to consider properly the merits of the issues raised, this Court must stay the execution of the death sentence."), *cert. denied*, 468 U.S. 1220 (1984).

In this case, the Court is not presented with such a short timetable. Petitioner's most recent habeas petition was denied by the Texas Court of Criminal Appeals on September 10, 1997. The scheduled execution date of January 15, 1998 is a full four months from that date. This amount of time is certainly adequate for the litigants to prepare the case. Moreover, in accordance with the scheduling order signed on even date herewith, the Court will have adequate time to consider the merits of the habeas petition after Petitioner files the petition on or before December 30, 1997 and Respondent files a response on or before January 6, 1998. As indicated in the aforementioned scheduling order, a stay of execution may be appropriate at a later date depending on the contents of the habeas petition. For this reason, the Court's denial of the motion for stay of

execution on the ground of time constraints shall be without prejudice.

B. Gosch is Not Entitled to a Stay Simply Because He is Within the Limitation Period of § 2244.

Next, Gosch argues that he is entitled to a stay of execution because his federal habeas petition is timely filed as long as it is filed before September 9, 1998 and, therefore, he should receive one full year to litigate his federal habeas claims. Gosch's argument can be outlined as follows. Gosch claims that because his state habeas petition was pending at the time AEDPA became effective, AEDPA's time limitation begins, with respect to Gosch, on the day it became effective, April 24, 1996. Next, Gosch reasons that because the limitation period of § 2244 is tolled for the time in which a petitioner has state habeas petitions pending, and because his state habeas petitions were pending as of the date of AEDPA's enactment, April 24, 1996, until September 10, 1997, Gosch should have until September 9, 1998 to file his federal habeas petition. Based on the Court's reading of various legal authorities concerning the applicability of the time limitation to petitioners whose direct reviews ended before the enactment of AEDPA, the Court agrees that this is the proper application of AEDPA to Petitioner.[3] However, Gosch concludes from this that the limitation period is more than just an outside limit on Gosch's ability to file a

[3]Several courts have concluded that this is the correct application of AEDPA's time limitation to prisoners whose direct reviews ended prior to the effective date of AEDPA (which was also the date of its enactment). *See Calderon v. United States District Court for the Central Dist. of Calif.*, 1997 WL 709900 (9th Cir. Oct. 29, 1997) ("AEDPA's one-year time limit d[oes] not begin to run against any state prisoner prior to the statute's date of enactment. . . . No petition filed on or before April 23, 1997 -- one year from the date of AEDPA's enactment -- may be dismissed for failure to comply with the section 101's time limit."); *United States v. Simmonds*, 111 F.3d 737, 745-46 (10th Cir. 1997) ("prisoners whose convictions became final on or before April 24, 1996 must file their § 2255 motions before April 24, 1997") (citing *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *reversed on other grounds*, 117 S.Ct. 2059 (1997), which stated that the time period imposed by AEDPA is "short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) and . . . 28 U.S.C. § 2255").

federal habeas petition; rather, he argues that the limitation period is also a minimum standard that should inure to the benefit of Petitioner such that he should receive a stay during the limitation period.

The Fifth Circuit has flatly rejected a similar argument. In *Byrne v. Roemer*, the Fifth Circuit held that a state inmate under a sentence of death was not entitled to a stay of execution where a state statute required that he be executed before the time expired in which he could seek review in the United States Supreme Court of the denial of his federal habeas petition. 847 F.2d 1130, 1131 (5th Cir. 1988) (the Louisiana statute provided that "[i]f any federal or Louisiana court grants a stay of execution . . . the trial court shall reset the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order"). Byrne argued that since he had ninety days in which to file an application with the United States Supreme Court for a writ of certiorari, the Louisiana statute requiring that Byrne be executed before the ninety-day time period expires was unconstitutional as it "denie[d his] due process and access to the courts [and] unduly abrogate[d] the time in which Byrne c[ould] exercise his federally established right of review, and it denie[d] Byrne equal protection because it treat[ed] habeas petitioners with a death sentence differently from other habeas petitioners without having a compelling reason or rational basis for doing so." *Id.* at 1132. Like Gosch, Byrne reasoned that the statute gave "any party who can petition for certiorari both (1) an absolute entitlement to ninety days in which to file the petition and (2) the ability to file unencumbered by any attempt to execute the judgment for which review is sought." *Id.* at 1134.

The court found, however, that to the extent that the federal statute created a right at all, it did not create one with the characteristics which Byrne ascribed to it. *Id.* The court explained

that "section 2101(c) does not fix ninety days as the minimum time which a party wishing to petition for certiorari must be given. Instead, by stating that the petition must be filed 'within ninety days,' section 2101(c) simply fixes ninety days as the maximum time a party may wait, without asking for permission from the Court, before filing its petition. Second, the section does not suggest that a judgment rendered against a party petitioning for certiorari may not be executed during the time in which the petition may be filed." *Id.*

This case is not notably different from *Byrne*; therefore, the Court believes that Gosch is not entitled to a stay of execution. Moreover, the Court also believes that this claim is without merit because (1) there is no evidence that Congress intended either (a) that the period of limitation should be enforced as a mandatory scheduling order or (b) that the period of limitation should give rise to a stay; (2) there *is* evidence that Congress intended AEDPA's time limitations to have *no* impact on decisions to stay executions; and (3) similar deadlines for ordinary litigants in federal court do not give rise to automatic stays.

First, contrary to Petitioner's arguments, there is no indication that Congress intended for AEDPA's one-year limitation period to be used as a mandatory scheduling order. Furthermore, there is certainly no indication that Congress intended that petitioners whose direct reviews ended prior to the effective date of AEDPA should benefit from a full year of federal habeas review. This is clear from the terms of the limitation period itself. The one-year limitation period does not begin with the end of state collateral review; rather, the time period begins to run at the end of *direct review* and is tolled only while Petitioner's state habeas petitions are pending. This means that for most prisoners whose direct reviews conclude after the effective date of AEDPA, the one-year limitation period will partially or even completely erode before the *state* habeas

petition is even filed. Therefore, a prisoner might have very little time or no time at all to file a federal habeas petition following state habeas proceedings. It is clear, therefore, that Congress did not intend for the one-year limitation period to be a minimum period of time in which a prisoner can prepare his federal petition. Rather, because of federal exhaustion requirements, it is very likely that most of the time counting toward AEDPA's limitation period will be used prior to the filing of a state habeas petition. Where prisoners with more recent convictions benefit from only one year to litigate *all* habeas petitions, the Court sees no reason why Petitioner should be entitled to one full year for federal habeas review in addition to the four years he has already spent in habeas proceedings.

Second, not only is there no indication that Congress intended the limitation period to create a "right" for Gosch, but there is every indication that Congress affirmatively intended for such a time limitation to have *no* impact on a court's decision to stay an execution. In 28 U.S.C. § 2266, AEDPA provides that "[a] district court shall afford the parties at least 120 days in which to complete actions, including the preparation of all pleadings and briefs, and if necessary, a hearing prior to the submission of the case for decision." 28 U.S.C. § 2266(b)(1)(B). However, AEDPA specifically provides that "[t]he time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled for the purpose of litigating any application or appeal." *Id.* § 2266(b)(3)(A). Therefore, if a petitioner is not entitled to a stay during the 120 days, the Court finds it difficult to believe that Congress intended for a petitioner to have a stay for an entire year.

Finally, Petitioner is simply wrong when he asserts that "[i]n no other area of law" is a party forced to litigate prior to the end of the appropriate period of limitation. The proper analogy

to ordinary civil law is not the initial filing of a civil action during an applicable limitation period, as Petitioner has suggested. Rather, the proper analogy is to the case of a litigant who, after failing to prevail in federal district court on an action for an injunction, moves for a stay of the district court's order pending appeal. As in this case, there is no automatic stay during the period in which the litigant can appeal the district court's ruling. *See* Fed. R. Civ. P. 62(a) ("Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.") Rather, the decision to grant a stay remains in the discretion of the court, *see* Fed. R. Civ. P. 62(c) ("When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."), and the determination is to be evaluated under the four-factored standard as explicated above. *See Florida Businessmen for Free Enterprise v. Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981). Consideration of the "statute of limitations" simply plays no part in any stay determination.

C. Forcing Gosch to Litigate under an Impending Execution Date is Not Cruel and Unusual Punishment.

Finally, Gosch argues that he should not be forced to proceed on his federal habeas petition while he is facing a scheduled execution date on January 15, 1998. He argues that as he has come very close to his scheduled execution twice before, if he again comes "extraordinarily close to death before receiving a stay," the attendant anxiety of repeated delays will constitute cruel and unusual punishment. He states that "[i]t cannot be gainsaid that subjecting a condemned man on

death row to the setting and re-setting of execution dates, and requiring him to unnecessarily approach within minutes of his execution, impugns fundamental human dignity when there is no legitimate state interest justifying the date in the first instance."

First, the Court disagrees with the proposition that there is no legitimate state interest in setting the execution date of a prisoner who was convicted of capital murder over eleven years ago. The Court also finds no support for the proposition that such resettings of the execution date constitute cruel and unusual punishment. No court has recognized repeated execution settings as cruel and unusual punishment. In fact, some courts have explicitly rejected this claim. *See McKenzie v. Day*, 57 F.3d 1493 (9th Cir.) (*en banc*) (court rejected petitioner's argument that a twenty-year delay between the conviction and the date of execution "combined with the repeated resetting of his execution date (8 times)" amounted to cruel and unusual punishment), *cert. denied*, 514 U.S. 1104 (1995); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir.) (under the abuse of writ doctrine, court dismissed petitioner's claim that executing him after 15 years on death row during which time he had faced at least seven execution dates would constitute cruel and unusual punishment; court noted that "there is no reported federal case that has adopted [petitioner's] position"), *cert. denied*, 515 U.S. 1173 (1995).

Additionally, many courts have rejected the similar argument that lengthy delays in carrying out an execution constitute cruel and unusual punishment. *See Lackey v. Scott*, 52 F.3d 98 (5th Cir.) (although *Teague v. Lane*, 489 U.S. 288, 310 (1989) precluded review on the merits, court vacated a stay of execution granted by district court on claim that executing him after 17 years' incarceration on death row would be cruel and unusual punishment), *stay granted, cert. dismissed*, 115 S.Ct 1818 (1995); *Pearance v. Scott*, 56 F.3d 633, 637-38 (5th Cir.) (rejecting

Eighth Amendment "delay of execution" claim under abuse of writ doctrine and noting that "it is unclear to us whether, even if it were held that delay in the imposition of the death penalty constitutes cruel and unusual punishment, commutation of the death penalty will turn out to be the appropriate remedy") (quoting *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir.), *opinion adopted*, 57 F.3d 1493 (*en banc*), *cert. denied*, 115 S.Ct. 1340 (1995)), *cert denied*, 115 S.Ct. 2603 (1995); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir.) (also rejecting similar claim on procedural grounds but addressing the merits in dicta by stating that there are compelling justifications for the delay between conviction and execution: the state's interest in deterrence and swift punishment must compete with its interest in insuring that those executed receive fair trials with constitutionally mandated safeguards), *cert. denied*, 117 S.Ct. 275 (1996); *Free v. Peters*, 50 F.3d 1362 (7th Cir.) (rejecting claim that to execute petitioner after almost two decades of pursuing appeals and collateral relief is cruel and unusual punishment), *cert. denied*, 115 S.Ct. 1397 (1995); *Richmond v. Lewis*, 948 F.2d 1473, 1491-92 (9th Cir. 1990) ("It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place."), *rev'd on other grounds*, 503 U.S. 958 (1992), *vacated*, 986 F.2d 1583 (9th Cir. 1993). Although these courts faced claims that were raised in successive petitions for writs of habeas corpus, their reasoning indicates that even without the procedural bar, they would have found the claims meritless. *See White*, 79 F.3d at 439-40.

III. CONCLUSION

For all of the above reasons, the Court finds that Petitioner simply has not made a substantial case on the merits of his Eighth Amendment claim. With respect to Petitioner's

arugment that he should receive a stay because the litigants will be unable to adequately brief the issues and the Court will be unable to review the merits of the habeas petition before the scheduled execution date, the Court will DENY the motion for stay, at this time. The Court may reconsider whether to grant a stay of execution if it believes that a stay is warranted after its review of the habeas petition and the government's response. Therefore, the motion for stay of execution is DENIED WITHOUT PREJUDICE.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 16th day of December, 1997.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED
DEC 17 1997
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

LESLEY LEE GOSCH,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. V-97-126
	§	
GARY JOHNSON, Director, Texas Dept. of Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

SCHEDULING ORDER

On this day, the Court held a scheduling conference and determined the following schedule for this case: Petitioner's application for writ of habeas corpus shall be filed not later than December 30, 1997. As discussed in the conference, Respondent, after reviewing the habeas petition, may decide not to oppose a stay of execution. If Respondent decides not to oppose the stay and wishes additional time to respond, he should so notify the Court not later than January 6, 1998. Otherwise, the response to the habeas petition shall be filed not later than January 6, 1998.

It is so ORDERED.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 16th day of December, 1997.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

12

APPENDIX C

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED

DEC 19 1997

MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

LESLEY LEE GOSCH,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. V-97-126**
	§	
GARY JOHNSON, Director, Texas Dept. of Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk
By [signature]
Deputy Clerk

ORDER

Pending before the Court is Petitioner's motion for reconsideration of the Court's Orders (1) denying a stay of execution and (2) establishing deadlines for the submission of the habeas petition and the response thereto. In the alternative, Petitioner requests that the Court amend its Orders to allow for an interlocutory appeal under 28 U.S.C. § 1292(b). After reviewing Petitioner's motions and the relevant legal authorities, the Court will DENY the motions.

I. MOTION FOR RECONSIDERATION

Petitioner's motion for reconsideration is based upon his argument that the period of limitation applicable to the filing of his federal habeas petition gives him the right to a stay of execution during the one-year limitation period; the Court has already rejected this argument and Petitioner presents no new authorities to support his position. Petitioner complains that this Court erroneously relied upon 28 U.S.C. § 2266 as evidence that Congress did not intend that AEDPA's time limitations should, by themselves, give rise to a stay of execution. The reliance was "erroneous," Petitioner argues, because § 2266 does not apply to prisoners of Texas.

The Court, however, did not "rely" upon § 2266 to deny the stay of execution because it

The Court, however, did not "rely" upon § 2266 to deny the stay of execution because it agrees that as § 2266 is part of Chapter 154, Texas is ineligible to invoke its provisions. Rather, the Court's reference to § 2266 merely supported its conclusion that Congress did not intend for AEDPA's time limitations to, by themselves, determine whether a stay should be granted. It is *Petitioner* who seeks to rely on the time provisions of Chapter 154 to support his argument that "[i]t makes no sense to interpret the AEDPA to guarantee a mandatory stay of execution to a capital habeas petitioner proceeding under the 'expedited' procedures of Chapter 154, while the entire process of federal habeas review of a death-sentenced inmate proceeding under the non-expedited procedures of Chapter 153 could be compressed into an extremely abbreviated period because of the State's scheduling of an execution date prior to the filing of a timely federal application."

As the Court has already explained, Petitioner is subject to Chapter 153; therefore, the correct comparison is the one the Court has already made: the comparison to other petitioners subject to § 2244. Petitioners whose limitation period is set forth by § 2244 are *not* entitled to a one-year period beginning with the conclusion of state *collateral* review. They are entitled to a one-year period following the conclusion of state *direct* review. For petitioners whose direct reviews end after the enactment of AEDPA, the amount of time in which to file a federal habeas petition after the conclusion of state collateral review may be extremely small or non-existent. Whether or not that period of time turns out to be shorter than the 180-day time period of Chapter 154 is irrelevant. Therefore, as the Court has already stated, where prisoners with more recent convictions benefit from only one year to litigate *all* habeas petitions, the Court sees no reason why Petitioner should be entitled to one full year for federal habeas review in addition to the four

years he has already spent in habeas proceedings.

Petitioner also argues that the Court's analysis of *Byrne v. Roemer* is inapplicable to this case because whereas the Petitioner in *Byrne* did not have the right to certiorari review, he does have the right to review by this Court. This distinction is not significant because in both cases, petitioners have the "right" to file petitions. *Byrne* acknowledged the existence of this right, holding that the limitation period "[i]s at most, a right to petition for certiorari which must be exercised within ninety days and a right to a procedure through which execution of a judgment may, if the procedure is utilized, be halted during the certiorari process. . . . [T]he Louisiana statute [which, in petitioner's case, fixed the execution date during the ninety-day period in which petitioner could petition for certiorari] simply does not affect any 'right' which the federal statute confers." *Byrne v. Roemer*, 847 F.2d 1130, 1134-35 (5th Cir. 1988). As in *Byrne*, to the extent that AEDPA creates a right to seek review that may be exercised during the one-year period, the Texas practice of setting execution dates within that period simply does not affect any right conferred by AEDPA. Because *Byrne's* thorough analysis applies to a situation very similar to this case, it is entirely relevant to this case, and the Court sees no reason to depart from it.

II. REQUEST FOR PERMISSION TO PURSUE INTERLOCUTORY APPEAL

In the alternative, Petitioner requests that this Court amend its Orders so that he can file an interlocutory appeal under 28 U.S.C. § 1292(b). Section 1292(b) provides that

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Petitioner asserts that the "controlling question of law" is "whether AEDPA requires a federal

district court to enter a stay of execution to [allow] a capital habeas petitioner to avail himself of the one year statute of limitations set forth in 28 U.S.C. § 22[44]." Petitioner argues that the Court's denial of a stay is "directly contrary" to that of the Seventh and Tenth Circuit Courts of Appeals and that there exists substantial ground for difference of opinion on the controlling question of law identified by Petitioner.

The Court disagrees. The cases cited by Petitioner merely set forth holdings concerning how AEDPA's one-year limitation period would apply to petitioners whose direct reviews ended before AEDPA's enactment. These holdings are set forth in the Court's December 16, 1997 Order; in no way do these cases state any holding at all relevant to whether AEDPA's time limitations should give rise to a stay of execution. Because Petitioner has cited *no* authority which holds that petitioner is entitled to a one-year stay and because there is no evidence that Congress intended this result, the Court finds that there is not a substantial ground for difference of opinion and sees no reason to amend its Orders so that Petitioner may file an interlocutory appeal.

Moreover, the Court wishes to reiterate that Petitioner has not met the basic prerequisite necessary for a court to grant a stay as he has not presented a substantial case on the merits of his habeas petition. In fact, he has not given any indication of the content of his habeas petition, much less its merit. For this reason, the Court cannot say that under § 1292(b) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

III. CONCLUSION

For all of the reasons stated above, Petitioner's motion for reconsideration or amendment of its Orders is DENIED.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 19th day of December, 1997.

John D. Rainey

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
1-12-98
MICHAEL N. MILBY, CLERK
BY DEPUTY J Richards

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

LESLEY LEE GOSCH,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. V-97-126
	§	
GARY JOHNSON, Director, Texas Dept. of Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

ORDER

Pending before the Court is Gosch's petition for writ of habeas corpus (Dkt. # 17). Also pending is Respondent's motion for summary judgment (Dkt. #22). For the reasons stated below, the Court will DENY Gosch's petition for writ of habeas corpus and GRANT Respondent's motion for summary judgment.

PROCEDURAL HISTORY

Gosch was convicted of capital murder on September 2, 1986 in the 24th District Court of Victoria County after the case was transferred from the 226th District Court of Bexar County. On September 4, 1986, the jury returned affirmative answers to the two special issues presented, and Gosch was sentenced to death. Gosch's conviction was affirmed on appeal to the Texas Court of Criminal Appeals on December 18, 1991 and his petition for writ of certiorari was denied on June 28, 1993. Following this process, Gosch was given his first execution date -- September 16, 1993. After a hurried round of state and federal habeas petitions and a stay granted by the United States District Court for the Western District of Texas, the United States District Court for the Western District dismissed Gosch's second federal habeas petition on the ground that the court lacked subject

matter jurisdiction. The Fifth Circuit affirmed this determination on the ground that "jurisdiction for habeas corpus petitions for Petitioner Gosch lies only in the United States District Court for the Southern District of Texas." *Gosch v. Collins*, Nos. 93-8635, 93-8780 (5th Cir. April 6, 1994). After another round of state habeas petitions, which were first filed in the state district court in April 1994 and finally denied by the Court of Criminal Appeals on September 10, 1997, and another intervening scheduled execution date of April 15, 1994 (which was also stayed), petitioner Gosch has now filed in this Court a petition for writ of habeas corpus.

FACTUAL BACKGROUND[1]

Gosch was convicted on the basis of both accomplice and non-accomplice testimony and evidence. John Rogers, Gosch's accomplice, gave the following testimony: In August of 1985, Gosch told Rogers that he was concerned about going to federal prison on a weapons violation. Gosch felt that it would not be "constructive" for him to be imprisoned for this offense and sought to have Rogers aid him in fleeing the country. The two originally planned to rob a bank in order to obtain sufficient funds for Gosch to flee the country. But Rogers rejected this alternative as "too risky and too violent." The two then discussed a second alternative -- kidnaping and ransoming the wife of a bank president. Gosch told Rogers that he knew of two potential targets in the Alamo Heights area of San Antonio and in late August or early September of 1985, Gosch first mentioned the name of Frank Patton as a potential target for the extortion plan. Their plan was for Gosch to gain access to the home under the guise of delivering flowers to Rebecca Patton. After entering the home, Gosch was to bind his victim with duct tape and then take her to a secluded, rural area of Bexar County. During this time Rogers was to go to North Star Mall and wait for Frank Patton to

[1] This is a condensed version of the facts as summarized by the Court of Criminal Appeals when it denied Gosch's appeal. *See Gosch v. State of Texas*, 829 S.W.2d 775, 777-82 (Tex. Crim. App. 1991) (en banc).

arrive with a ransom payment.

On September 18, 1985, they attempted to carry out their plan for a third time (they had made two previous attempts on September 16th and 17th which they aborted for various reasons). After stopping at a Stop and Go convenience store, they drove by the Pattons' home. After placing phone calls to ascertain whether Mrs. Patton was home alone and whether Mr. Patton was available at the bank, Gosch went to the home with a flower box containing a .22 caliber pistol, a black silencer and a roll of duct tape. When he received no answer at the door, he left the vicinity with Rogers and called Mrs. Patton to inform her that he was attempting to deliver flowers. She said that she had been vacuuming and had been unable to hear the door. After placing a second phone call to the bank to check the availability of Mr. Patton (this time identifying himself to Mr. Patton's secretary as "Mr. Anderson"), Rogers drove Gosch back to the Pattons' neighborhood and returned to a pay phone to await Gosch's call. Instead, Gosch came running back to the phone booth and stated, "There was no need to go get the money because [I] killed her." After returning to Gosch's apartment, Gosch gave Rogers a black bag containing the Ruger automatic, two silencers, another handgun and some ammunition. Gosch also gave Rogers a bag containing Gosch's shirt and shoes. Rogers took these items (except the shoes) to his apartment and put the two pistols, the two silencers, and the ammunition into a brown attache case and gave it to Stephen Hurst that evening. Rogers asked Hurst to take the weapons and put them up out of the way, or, as he phrased it, "put them in the deep freeze." On the day after the murder, Rogers picked up Gosch at the Wonderland Mall and they returned to Rogers's apartment where Gosch lived until the two were arrested on September 25, 1985.

Rogers's testimony was corroborated by a variety of non-accomplice testimony:

(1) Sherry Satel, a friend of Mrs. Patton, stated that she was talking on the phone with Mrs. Patton when Mrs. Patton received another call, and, after taking the call, informed Mrs. Satel that someone had called to tell her that they would be coming to her home to deliver some flowers.

(2) Sherry Covarrubias testified that on September 18, 1985 she saw Rogers and Gosch come into the Stop and Go convenience store where she worked.

(3) Mr. Patton's secretary, Ms. Galindo, testified that on September 18, 1985 at approximately 2:25 p.m. Mrs. Patton called her husband at the bank. Mr. Patton's secretary believed Mrs. Patton to be acting unusually abrupt and unfriendly on the phone. Mr. Patton received the call and wrote a note for his secretary explaining that there was an extortion threat. Galindo also testified that earlier in the day, an individual by the name of Mr. Anderson had called and asked to speak with Mr. Patton.

(4) Mr. Patton testified concerning the phone call he received in which he was told to get money together in a briefcase in "fifties" and "hundreds." The caller told Mr. Patton that the money was to be taken to the picnic area of North Star Mall. He was told that he had "forty-five minutes to get the money there, or it will all be over." Shortly after the extortion call, members of the Castle Hills police department arrived at the bank and informed Mr. Patton that his wife was dead. In an attempt to catch the murderer, Mr. Patton went to North Star Mall and stood by the pay phone for an hour. No one came. Mr. Patton also testified that he met Gosch at Chris Catham's sailboat shop in San Antonio in June of 1985. He told Gosch that he was a bank president and gave Gosch a business card.

(5) Police Officers testified that there was no sign of disturbance at the home and that when they arrived, Mrs. Patton was still warm to the touch.

(6) The Chief Medical Examiner testified that Mrs. Patton had been shot six times in the head, a firearms examiner testified that the shots came from the Ruger .22 caliber pistol (which Stephen Hurst had taken to the Alamo Heights police department), and Randall Wroblewski (a friend of Gosch) and the owners of Don's Gun Sales (Don and Leslie Carter) testified that Gosch owned the murder weapon. Specifically, Wroblewski testified that he had bought the weapon at Gosch's request and after he paid for the gun he gave it to Gosch immediately. This was consistent with firearms transaction records which showed that the murder weapon was purchased at Don's Gun Sales by Wroblewski.

(7) Texas Ranger Bob Steele testified that when he searched Rogers's apartment at the time of Gosch's arrest, he found books concerning how a person could change his or her identity and newspapers containing articles about the Patton murder. Additionally, officers found a crumpled, handwritten note containing the following notation: "Long-Term Strategic Goals: 1. New I.D. w/ complete history. $100 K to $200 K U.S. Cash 3. Closed File on Old I.D." A forensic document examiner testified that the note was written by Gosch.

(8) Officers also recovered a pair of blood splattered-blue jeans from Rogers's apartment at the time of the arrest. Additionally, in Rogers's automobile, they found a pair of black gloves, a map of Belize, a story on the nation of Belize, and a birth certificate belonging to Chris Catham, Gosch's employer. Analysis of the blood on the jeans revealed that the blood was type "A," the same type as Mrs. Patton. Gosch has type "O" blood.

STANDARD OF REVIEW

As the Fifth Circuit observed in *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1114 (1997), 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective

Death Penalty Act (AEDPA), limits the ability of federal courts to grant habeas relief to state prisoners and sets forth the following standard of review for granting a writ of habeas corpus:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (West Supp. 1997).

In applying § 2254(d)(1) as amended by AEDPA, it must first be determined whether the claim was adjudicated on the merits in state court proceedings. *Drinkard*, 97 F.3d at 768; *Lockhart v. Johnson*, 1997 WL 7311 (5th Cir. 1997) at *4. If there has been an adjudication on the merits, AEDPA's new standards of review are applied to all habeas petitions filed after AEPDA's enactment. *See Drinkard*, 97 F.3d at 765.[2] The Fifth Circuit has held that "when this statute is read holistically, . . . subsection (d)(1) provides standards of review for questions of law and mixed

[2]Despite Petitioner's protestations to the contrary, the Fifth Circuit has repeatedly held that these provisions of AEDPA apply to petitioners, such as Gosch, who file their habeas petitions after AEDPA's enactment. Although the Fifth Circuit's first case announcing this holding, *Drinkard v. Johnson*, was overruled with respect to its holding which resulted in AEDPA's retroactive application to petitions which were pending at the time of AEDPA's enactment, *see Lindh v. Murphy*, 177 S.Ct. 2059 (1997) (holding that AEDPA does not apply to applications in habeas cases that were already pending when AEPDA was passed), the Fifth Circuit has subsequently made it clear that AEDPA's standards of review do apply to petitions which are filed after AEDPA's enactment. *See Nobles v. Johnson*, 127 F.3d 409, 413 n.4, 414-15 (5th Cir. 1997) (noting that (1) *Lindh* held only that if a habeas case was filed before AEDPA's enactment, the pre-AEDPA standards apply; (2) "*Drinkard* and its progeny presumably remain precedent in this circuit to the extent they interpret the provisions of the AEDPA and do not conflict with *Lindh's* conclusion that the chapter 153 amendments do not apply to cases pending on the effective date of [AEDPA]"; and (3) AEDPA's standards apply to petitions filed after AEDPA's effective date); *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997) (holding that petitions filed before AEDPA's enactment are subject to pre-AEDPA standards and noting that *Drinkard* remains precedential to the extent that it is not contrary to *Lindh*).

questions of law and fact" and subsection (d)(2) supplies the standard of review for questions of fact. *Id.* at 767.

Questions of Law

The *Drinkard* court held that the first clause of (d)(1) refers to questions of law such that "[w]hen reviewing a purely legal question, a federal court may grant habeas relief only if it determines that a state court's decision rested on a legal determination that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court." *Id.* at 768.

Mixed Questions of Law and Fact

The second clause of subsection (d)(1) "refers to mixed questions of law and fact . . . . Thus, when reviewing a mixed question of law and fact, a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court,' to the facts of the case." *Id.* at 767-68. The Fifth Circuit has given the following meaning to this standard of review:

> The use of the word 'unreasonable' in formulating this restrictive standard of review implicitly denotes that federal courts must respect all *reasonable* decisions of state courts. Thus, given the statutory language, and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is *unreasonable* only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Id. at 769 (emphasis in original) (holding that disagreement among the Fifth Circuit panel hearing the case showed that the application of law by the state court was not unreasonable and AEDPA, therefore, barred the Fifth Circuit from granting relief on his claim); *see also Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996) (characterizing the standard of review for mixed questions of law

and fact as "a somewhat hybrid standard of review that is probably most closely akin to the traditional 'clearly erroneous' standard than to any other established standard of review" and explaining that "[i]n effect, a reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that view of the applicable precedent").

Questions of Fact

Subsection (d)(2) permits federal court relief if the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d)(2). Therefore, this subsection provides the applicable standard of review for questions of fact and to the extent that state court adjudications embody determinations of fact, relief is foreclosed unless the state court's determination of fact was unreasonable in light of the evidence presented to it. *Drinkard*, 97 F.3d at 767.

Moreover, aside from the preclusive effect of a state court's adjudication on the merits that satisfies the standard of review under § 2254(d)(2), § 2254(e)(1) provides more generally that all state court findings of fact are to be presumed correct. *See* 28 U.S.C. § 2254(e)(1) (West Supp. 1997) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

ANALYSIS OF GOSCH'S CLAIMS

Gosch's ten claims for habeas relief are as follows:

1. The State knowingly permitted false testimony to stand in violation of the Fifth, Sixth, and Fourteenth Amendments.

2. The State withheld material, exculpatory evidence in violation of the Fifth, Sixth, and Fourteenth Amendments.

3. Gosch received ineffective assistance of counsel during the guilt/innocence phase of the trial.

4. Gosch's trial counsel labored under an actual conflict of interest that adversely affected his performance.

5. Gosch received ineffective assistance of counsel during the punishment phase of the trial.

6. The admission of unadjudicated extraneous offenses at the punishment phase of the trial violated the Eighth and Fourteenth Amendments.

7. Gosch's Eighth and Fourteenth Amendment rights were violated by the Texas courts' refusal to apply *Geesa v. State* retroactively.

8. The punishment phase jury instructions misled the jury regarding the effect of a "no" vote by a single juror.

9. The second special issue, as interpreted and applied in this case, is unconstitutionally vague and does not provide a basis for distinguishing those who are sentenced to death and those who are not.

10. Gosch's execution would violate the Eighth Amendment because he has been subjected to repeated, "unnecessary" execution dates.

The Court will address these claims in turn.

I. FALSE TESTIMONY CLAIM

Gosch's first claim is based upon the testimony of Stephen Asher Hurst. According to the state court's findings of facts, Hurst, an acquaintance of Gosch's accomplice, John Rogers, related that on September 18, 1985, the day of the murder, Rogers gave him a briefcase. Although he was initially unaware of the contents of the briefcase, Hurst later discovered that the briefcase contained three weapons, including a .22 caliber pistol, which was ultimately shown to be the murder weapon. On September 25, 1985, two days after a group of San Antonio banks offered a $100,000 reward,

Hurst took the weapon to the Alamo Heights Police Department and gave a statement to law enforcement officials. Sometime later he gave a second statement to law enforcement officials. Both statements were made available to defense counsel prior to cross-examination of Hurst.

During the course of Hurst's cross-examination, Petitioner's counsel asked Hurst about the $100,000 reward offered by a group of San Antonio banks. The cross-examination unfolded as follows:

Q. Were you aware of a reward that was out for any information leading to the arrest, indictment and conviction of anybody?

A. I had heard of it.

Q. You heard there was a reward out, didn't you?

A. Yes, sir.

Q. In fact, you heard of that reward the very day that you went to the Alamo Heights Police Department, didn't you?

A. No, sir.

Q. Are you sure about that?

A. I'm sure.

Q. Didn't you call down there and ask about it?

A. No, sir.

Q. You sure about that?

A. I am positive.

Q. And you deny to us today that you didn't call or have anybody call to find out about a reward?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Have you made a claim for that reward, sir?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Has anybody in your family made claim for that reward?

A. No, sir.

Q. You're positive about that?

A. Yes, sir.

Statement of Facts, Vol. VII at 32-34.[3]

On redirect examination, the prosecutor clarified the record:

Q. When you went down to the Alamo Heights Police Department with the briefcase and the .22 and the silencers and whatever else it contained, had you heard about a reward for information leading to the arrest and conviction of the kidnaping or murder of Becky Patton?

A. Yes, sir.

Q. You had heard about it?

A. Yes, sir.

Q. Okay. Who did you go down to the police station with?

A. With Ned Dryer. He's my uncle.

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[3]For purposes of referencing the state court record, the Court will use the following citation forms: For references to the trial statement of facts -- "Statement of Facts Vol. ___ at ___"; for references to the state court's findings of fact and conclusions of law in its order denying habeas relief -- "Order"; for references to the state court's evidentiary hearing during its review of Gosch's state habeas petition -- "E.H. Vol. ___ at ___"; and for references to Gosch's current federal habeas petition -- "Petition."

Q. With your uncle?

A. Yes, sir.

Q. And had your uncle heard about it?

A. Yes, sir.

Q. Okay. Do you know if you're going to get a reward for turning in John Rogers and turning in that .22 pistol?

A. No, sir.

Statement of Facts, Vol. VII at 36.

Testimony at the evidentiary hearing established (1) that Hurst was aware of the reward within a day of going to the police station; (2) that Hurst was aware that the reward was contingent upon the arrest and conviction of the responsible parties; (3) that Hurst did not inquire about the reward on the day he initially went to the police department; (4) that approximately one month later, Hurst did ask Roger Terry, Alamo Heights Police Chief, what would have to happen before he could "attempt to receive" the reward; (5) that Terry told Hurst that he would have to contact the bankers; (6) that Hurst did contact a representative of the bankers after the trial; and (7) that Hurst eventually received the $100,000 reward. Order at 6-7. Additionally, in its review of Gosch's habeas application, the state court found that "[i]t was . . . conclusively established that trial counsel was aware, prior to trial, of the existence of the reward *and Hurst's interest in it*, from reading articles in the local newspaper." Order at 8 (citing E.H. Vol. I at 89, 90; Vol. II at 30) (emphasis added).

Gosch claims that a due process violation arose during Hurst's testimony because the prosecutor allowed false or misleading testimony to stand. To prevail on this claim, Gosch bears the burden of demonstrating that Hurst testified falsely, that the prosecution offered the testimony knowing it to be false, and that the false testimony was material. *Giglio v. United States*, 405 U.S.

150 (1972); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997). With respect to the requirement that the testimony be false, courts have held that a constitutional violation occurs when the jury hears false testimony even if the testimony goes only to the credibility of a witness rather than directly to the issue of the defendant's guilt, and when the State allows unsolicited false evidence to go uncorrected. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957). Moreover, the Fifth Circuit has held that it "will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses." *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977); *see also Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) (holding that a formalistic exchange of testimony, even though technically not perjurious, would surely be highly misleading to the jury, reversing the district court's denial of the habeas petition, and remanding the case for a determination of the truth of petitioner's allegation). With respect to *Giglio's* materiality component, "[f]alse evidence is 'material' only 'if there is any reasonable likelihood that [it] could have affected the jury's verdict.'" *Nobles*, 127 F.3d at 415; *see also United States v. Bagley*, 473 U.S. at 679 n.9.

With respect to this claim, the state court stated, after conducting an evidentiary hearing, that while it had "difficulty . . . ascertaining whether Hurst perjured himself when he denied making a phone call to find out about the reward [because] at trial the questions propounded to him were all couched in terms of his actions and knowledge vis-a-vis the reward *on the day the gun was surrendered*[, i]n light of the record from the trial, and from the writ hearing, where the issue as to the timing of Hurst's call was clarified, . . . the Court f[ou]nd[] that Hurst did *not* perjure himself during the course of his cross-examination." Order, at 15 (emphasis in original). The state court,

therefore, found that petitioner failed to meet his burden of proof regarding his false testimony claim for relief. Order, at 9. This is a determination based on the state court's factual finding that Hurst's testimony was not false. Because this Court is limited in its review of Gosch's claim by § 2254(d)(2), the Court can only grant relief on Gosch's false testimony claim if the state court's decision is based on an unreasonable determination of facts in light of the evidence presented. The Court believes that the state court's findings of fact which support its conclusion that there is no due process violation are not unreasonable. Therefore, to the extent that Petitioner's claim is that the prosecutor knowingly used false testimony, as the state court found that there was no false testimony, Petitioner has not established his claim.

But Petitioner complains that it is not necessarily the actual falsity of the testimony that creates a due process violation; rather, Petitioner cites Fifth Circuit authority for the proposition that technically true testimony which is seriously misleading can also give rise to a due process violation. *See Blankenship v. Estelle*, 545 F.2d 510, 513-14 (5th Cir. 1977); *Dupart v. United States*, 541 F.2d 1148 (5th Cir. 1976). As the state court did not make a specific finding on this claim of "misleading" testimony, the Court will address the state court's alternative holding that there was no due process violation because any "misleading" testimony did not result in sufficient harm. Specifically, the state court found that "if a due process violation arose because the question of when Hurst called about the reward was not clarified by the State on redirect examination, that error was harmless beyond a reasonable doubt." Order, at 16 (stating that "[i]n light of the evidence adduced at trial, the minimal proof of perjury, the fact that Hurst readily admitted knowledge of the reward, and the fact Hurst's testimony at trial was merely corroborative of that of John Rogers, . . . any error which arguably arose was harmless at best").

In reaching this conclusion, the court stated that "[i]n the context of collateral review, a habeas corpus applicant has the burden to prove by a preponderance of the evidence, that the error (the prosecution's use of perjured testimony) contributed to his conviction or punishment." *Id.* (citing *Ex Parte Fierro*, 934 S.W.2d 370 (Tex. Crim. App. 1996) and *Ex Parte Dutchover*, 779 S.W.2d 76 (Tex. Crim. App. 1989). Petitioner argues that this was the wrong standard of review and that the correct standard would place the burden on the state. Nevertheless, the Court notes that the standard as articulated by the state court, although different than that typically stated in federal court opinions, is not contrary to clearly established federal law, as determined by the Supreme Court, in light of the Supreme Court's holding in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) that the *Chapman* standard need not apply to collateral review of federal constitutional trial errors.

In any case, under the materiality standard, as typically articulated by the Fifth Circuit, false evidence is only "material" if there is any reasonable likelihood that it could have affected the jury's verdict. Initially, the Court notes that the state court's failure to make findings on the claim that testimony was misleading is not contrary to clearly established federal law, *as determined by the Supreme Court*, because Petitioner has pointed to no Supreme Court authority holding that true but misleading testimony can give rise to a due process violation. Nevertheless, even if the state court was required to make findings on the claim that testimony was misleading and even if the standard of review was improperly stated, this Court must still deny habeas relief because there is not a reasonable likelihood that the evidence that Hurst and his uncle made two inquiries about the reward would have affected the jury's verdict. For one thing, evidence that Hurst knew about the reward before he went to the police station was presented to the jury as evidence with impeachment value. Moreover, to the extent that there is any significant difference between Hurst's *knowledge* of the

reward and his exhibited *interest* in obtaining the reward, because of the large amount of evidence corroborating Rogers's testimony, any misleading quality of Hurst's testimony was simply not material. For this reason, even if the testimony was misleading, although not technically false, the Court cannot grant relief because under any standard of harm, the error was not prejudicial.

II. *BRADY* CLAIM

With respect to Hurst's and Hurst's uncle's inquiries to the police concerning the reward, Petitioner also claims that the prosecution's failure to disclose these inquiries to defense counsel violates *Brady v. Maryland* which held that a prosecutor's suppression of evidence that is favorable to an accused violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith on the part of the prosecution. 373 U.S. 83 (1963). Evidence is material only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A reasonable probability of a different result is demonstrated when nondisclosure puts the case in a different light so as to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419 (1995). If omitted evidence is shown to be material, constitutional error has been committed, and reversal of the conviction is required. *United States v. Agurs*, 427 U.S. 97, 112 (1976); *Brady*, 373 U.S. at 87. A successful *Brady* claim must show (1) the prosecutor suppressed evidence, (2) the evidence was favorable to the accused, and (3) the evidence was material to the defendant's guilt or punishment. *Bagley*, 473 U.S. at 674-82; *Agurs*, 427 U.S. at 109. Favorable evidence includes exculpatory and impeachment evidence. *Giglio*, 405 U.S. 150, 154 (1972). The government is not obligated to provide information which is available to the defendant or that could be obtained through reasonable diligence. *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990), *cert. denied*, 498

U.S. 1055 (1991).

The state court found that "[i]t was . . . conclusively established that trial counsel was aware prior to trial, of the existence of the reward *and Hurst's interest in it*, from reading articles in the local newspaper."[4] Order, at 8 (emphasis added). Moreover, the state court made the following findings: (1) one aspect of defense counsel's trial strategy was to impeach Hurst with evidence that his testimony was motivated by a desire to obtain the reward money, *Id.* at 12; (2) defense counsel was also aware, prior to trial, of the amount of the reward and "that the reward was contingent upon the arrest and conviction of the responsible party," *Id.* at 8-9, 12; (3) defense counsel obtained knowledge regarding the reward from the media and the District Attorney's office, *Id.* at 12; and (4) "trial counsel was fully cognizant of the fact that the reward existed and that Stephen Hurst was a potential recipient of the reward," *Id.* Based on these findings, the state court found that Petitioner had not demonstrated a *Brady* violation because the exculpatory evidence was in the possession of the Petitioner and/or Petitioner's trial counsel. *Id.* The Court also wishes to add that Petitioner has conceded that "[t]here were numerous indications that Stephen Hurst's motive to turn in the briefcase and to later testify for the prosecution at Mr. Gosch's trial was in large part to receive the generous reward money." Petition, at 87-88 (supporting his ineffective assistance of counsel argument by stating that "the information necessary to glean that Hurst was motivated by the reward was readily available" as it was clear (1) from Hurst's uncle's statements to the police that he was eager to prove that he and Hurst knew who killed Mrs. Patton and (2) from Alamo Heights Police Chief Roger Terry's statement to the press that "the reward had something to do with [Hurst's

[4]These articles, Petitioner's Evidentiary Hearing Exhibits 4 and 5, included statements by the Alamo Heights Police Chief to the effect that he believed an informant was motivated by the reward. The newspaper article, however, stated that the informant had called in to the police station.

coming forward.]").

Thus it is clear that the state court's ruling is not based on an unreasonable determination of the facts nor is the application of the *Brady* standard to these facts an unreasonable application of clearly established federal law. In any case, even if the state court was in error when it found that trial counsel had full and accurate knowledge of Hurst's and Hurst's uncle's inquiries concerning the reward, the failure to disclose this information to defense counsel does not establish a *Brady* claim because the evidence was not material. Rather, due to the large amount of evidence corroborating Rogers's testimony against Gosch and due to the fact that Hurst's (1) knowledge of the reward, (2) failure to come forward with evidence before the reward was offered, and (3) eligibility for the reward was presented to the jury as impeachment evidence, there is not a reasonable probability that additional impeachment information concerning Hurst's and Hurst's uncle's two inquiries would have led to a different result. The non-disclosure of this supplemental information concerning Hurst's interest in the reward simply does not put the case in a different light so as to undermine confidence in the verdict. Therefore, Petitioner has failed to establish a *Brady* claim.

III. CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT/INNOCENCE PHASE OF TRIAL

According to *Strickland v. Washington*,

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984). When reviewing *Strickland* claims, "judicial scrutiny of counsel's performance must be highly deferential," and "every effort must be made to eliminate the distorting effect of hindsight." *Id.* at 689; *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (the deficiency prong of the *Strickland* test for ineffective counsel is judged by counsel's conduct viewed as of the time of his conduct). Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Petitioner claims that he received ineffective assistance of counsel during the guilt/innocence phase of his capital trial. While the Court will evaluate this claim in a "wholesale" rather than "piecemeal" fashion, it is necessary to break down and categorize the many ways in which Petitioner claims that his counsel's performance was constitutionally deficient. Petitioner makes four broad allegations concerning defense counsel's ineffective assistance during the guilt/innocence phase of the trial: (1) defense counsel's failure to investigate properly; (2) defense counsel's failure to raise *Batson* objections; (3) defense counsel's actions with respect to the blood-stained jeans; and (4) defense counsel's failure to more strongly advocate for additional accomplice jury instructions with respect to Hurst and Howells. These claims and their various sub-parts will be considered in turn.

A. Failure to Investigate

Petitioner alleges a variety of actions that defense counsel Richard Woods failed to take during the investigation of the case. These include (1) failure to hire additional witnesses; (2) failure to interview prosecution witnesses; (3) failure to properly ascertain Hurst's inquiries about the reward and effectively cross-examine Hurst on his motivation for testifying; (4) failing to consult with experts who tested the blood-stained jeans; and (5) failing to review the District Attorney's files

(pursuant to the District Attorney's "open file" policy) prior to pretrial proceedings.

> As the state court properly explained,
>
> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counselor's judgments. . . . The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Order at 37 (quoting *Strickland*, 466 U.S. at 691). With respect to items (1), (2) and (4), the state court found that petitioner's admission to his trial counsel that he killed Mrs. Patton eliminated the need for certain investigations concerning whether someone else had killed Mrs. Patton. Instead, trial counsel reasonably and necessarily focused his efforts on proving that the State had not met its burden on the elements of the offense. To the extent that Petitioner's claims concerning Woods's failure to interview witnesses or hire experts was adjudicated on the merits by the state court on the above grounds, the Court finds that the state court's determination was not an unreasonable application of clearly established federal law. To the extent that these allegations raise claims which were not presented to or adjudicated by the state court (e.g. the claim that defense counsel failed to review the files of the District Attorney's office prior to pretrial proceedings and the claim that defense counsel did not conduct enough witness interviews), the Court finds that none of these actions meets either the deficiency or the prejudice prong of *Strickland*.

With respect to defense counsel's investigations concerning Hurst's interest in receiving the reward, based on its articulation of fourteen factual findings (including a finding that "[t]he jury was well aware of the fact that Hurst was aware of that reward at the time he turned in the murder weapon" and a finding that "Woods attacked the credibility of Hurst on cross-examination and during the course of his closing arguments"), the state court found that Petitioner did not establish prejudice under *Strickland* because the existence of an additional fact that could have been used to impeach Hurst did not give rise to a result that is fundamentally unfair or unreliable. "Furthermore," the state court found, "even if Woods had been able to demonstrate that in addition to knowing about the reward (a fact which Hurst readily acknowledged in front of the jury) Hurst vocalized his knowledge a month later to Roger Terry, hence demonstrating that Hurst might receive a reward, trial counsel would still have had to convince the jury that *John Rogers'* testimony was completely false." This finding is not an unreasonable application of clearly established federal law to the facts pertaining to defense counsel's investigations.

B. Failure to Raise *Batson* Objections

Petitioner alleges that trial counsel failed to provide effective assistance by objecting to the prosecution's exercise of peremptory strikes against five black and four Hispanic members of the venire. The state court found that "[a]t the time of the petitioner's trial (August of 1986) the Supreme Court of the United States had not yet held that the protections of *Batson v. Kentucky*, 476 U.S. 79 (1986) apply in cross-racial settings, which allows for a white male [such as Gosch] to challenge the prosecution's use of peremptory strikes against members of minority groups. . . . Inasmuch as this 'right' did not arise until almost five years after the petitioner's trial, the petitioner has not shown that the failure to object was error on the part of [defense counsel]." Order at 47.

Moreover, the state court found that even if the failure to object constituted a deficiency under *Strickland*, "petitioner has not alleged, or proven, that he was prejudiced in the manner envisioned by *Lockhart*. Put in other words, it has not been shown that, by allowing the jury which ultimately heard the case to render its verdict, as opposed to a jury that would have passed muster under *Batson*, the result of the trial was fundamentally unfair or unreliable." *Id.*, at 48. In making this determination, which is a mixed question of fact and law, the Court finds that the state court did not unreasonably apply clearly established federal law to these facts.

C. Failures With Respect to the Blood-Stained Jeans

Third, Petitioner argues that defense counsel made several serious mistakes in handling the blood-stained jeans which were found at Rogers's apartment. After FBI testing performed at the behest of the prosecution, the FBI could conclude only that the blood contained an "A" antigen. In its report, the FBI also concluded that it was unable to do further testing because all testable samples had been consumed. Nevertheless, at some point, defense investigator Brian Price submitted the jeans to Jane Nellis, a forensic serologist working in the Bexar County Crime Lab, for further testing. She found that the blood stains were of type "A" and she was called by the prosecution to testify regarding these results. Petitioner argues that counsel was ineffective in (1) submitting the jeans to a county employee for testing without insulating, in some fashion, the results of the testing and (2) failing to attack the credibility of this testing in light of the FBI examiner's finding that there were no testable samples remaining.

The state court again by-passed the deficiency prong of *Strickland* and found that Petitioner did not show prejudice under *Strickland*. It based this finding on five factual findings:

> (1) Nellis' testimony did not provide the prosecution with evidence which directly linked the petitioner to the murder of Rebecca Patton;

> (2) At best the evidence showed that a pair of jeans with a blood type stain shared by 40% of the population was found in the home of the co-defendant;
>
> (3) Woods utilized Nellis' conclusions to bolster his argument that Hurst was involved in the murder of Rebecca Patton;
>
> (4) There has been no demonstration that the prosecution could not have obtained the same expert testimony in a manner wholly independent from the manner in which it was obtained;
>
> (5) At the time of trial Woods had been informed by petitioner in no uncertain terms, that petitioner had been the person who shot and killed Rebecca Patton.

Order at 46. The state court concluded that "petitioner has not even approached a showing of prejudice as defined by *Lockhart v. Fretwell* . . . ." *Id.*

Petitioner argues that this finding is an unreasonable determination of the facts in light of the state court record because (1) the evidence regarding the jeans was "critical" as it concerned one of the few items of physical evidence linking Gosch to the crime, (2) defense counsel was not able to utilize Nellis's testimony to Gosch's advantage, (3) the state court's finding that the prosecution could have obtained the information some other way is erroneous, and (4) the state court's consistent use of Petitioner's confession to his attorney to negate the existence of harm renders its factual findings unreliable. The Court agrees that Petitioner's admission of guilt to his attorney is not relevant to whether he suffered harm at trial, but the state court's decision that there was no showing of prejudice as defined by *Strickland* and *Lockhart*, is adequately supported by other factual findings which are reasonably determined in light of the state court record.

In any case, the state court's reference to Gosch's confession to Woods *is* relevant to Gosch's ability to establish *Strickland's* deficiency prong. Although the state court did not address the deficiency prong of *Strickland*, Petitioner clearly has not met *Strickland's* deficiency prong since trial counsel repeatedly testified at the state court's evidentiary hearing that his failure to inquire

about the blood testing was the result of a deliberate trial strategy to maintain the focus on whether the jeans belonged to Hurst; defense counsel believed that he would lose credibility if he attacked the blood evidence, especially since the blood evidence did not conclusively establish that the blood was that of Mrs. Patton and it did not connect Gosch to the crime. To the extent that Petitioner claims that defense counsel should never have submitted the jeans to Nellis for testing without insulating the results from the prosecution, defense counsel could not even remember having given the jeans to Nellis. E.H. Vol. 1 at 126. His failure to remember after nine years why he acted in certain ways during the investigation does not render his investigation unreasonable at the time and does not mean that it was not the product of trial strategy. In fact, Price testified that he believed that the decision to use Nellis was made jointly with defense counsel and Gosch, himself. *Id.*, Vol. III at 38. Most significantly, Price testified that he was not sure whether Gosch had admitted to the killing or whether Gosch was maintaining his innocence at the time Price gave Nellis the jeans for testing. *Id.* at 43. Furthermore, Price confirmed that he would not have recommended testing the jeans after Gosch confessed, but agreed that if he was, in fact, pursuing a course that Gosch was not the shooter, such testing might have been beneficial. *Id.* at 44-45. Because testing the jeans could have been a perfectly rational course of action given Gosch's statements to his lawyers that he did not kill Mrs. Patton, Petitioner simply has failed to meet *his* burden of proof to establish that defense counsel's actions were constitutionally deficient with respect to the testing of the jeans.

D. Failure to "Advocate for" a Jury Instruction Regarding Accomplice Testimony

Finally, Petitioner argues that defense counsel's failure to cite legal authority on behalf of his requested accomplice witness instructions, with respect to the testimony of Stephen Hurst and John Howells in the guilt/innocence jury charge, constitutes ineffective assistance of counsel.

Although the trial court had instructed the jury that Rogers was an accomplice and that the jury could not convict Gosch upon Rogers's testimony unless they found some evidence apart from his testimony tending to connect Gosch with the offense, the trial court rejected counsel's request for an instruction that the jury could find that Hurst and Howells were also accomplice witnesses, whose testimony could not be used to corroborate the testimony of other accomplices. With respect to this claim, the state court found that Petitioner failed to present any authority for the proposition that the trial judge erred in refusing the requested instructions; therefore, the court ruled that Petitioner failed both prongs of *Strickland*.

Regardless of whether there is legal authority to support Petitioner's argument and regardless of whether defense counsel's failure to cite legal authority on behalf of his requested instruction was deficient, because the Court of Criminal Appeals found sufficient corroborating evidence, independent of the testimony of Hurst or Howells, Gosch suffered no prejudice from this lack of instruction. *See Gosch*, 829 S.W.2d at 782. Specifically, on Gosch's direct review, the Court of Criminal Appeals determined that Rogers's testimony was corroborated by "ample evidence" including the following: (1) Gosch knew Frank Patton's identity and occupation; (2) Gosch was seen in the vicinity of the offense in the company of the accomplice on the day of the crime; (3) Gosch owned the murder weapon; (4) Gosch was arrested at the location where the police found clothes splattered with the same blood type as that of the deceased; (5) Gosch wrote a note stating that he needed "$100 K to $200 K U.S. Cash" and had a motive for obtaining that large amount of money in a hurry (his desire to avoid serving federal prison time by fleeing to Belize); and (6) Gosch solicited the aid of a friend in an attempt to flee the country two days after the offense. *Id.* These factual determinations made by the state court are presumed correct under 28 U.S.C. § 2254(e)(1).

Gosch has not rebutted this presumption by clear and convincing evidence; therefore, failing to establish prejudice under *Strickland*, he is not entitled to relief on this claim.

Although the Court has treated these allegations in a categorized and broken-down fashion (as they were presented to the Court by Petitioner), the Court recognizes that Petitioner's claim is that defense counsel rendered ineffective assistance at the guilt/innocence phase of the trial when considered in totality. The Court has considered the total effect of any errors by counsel which might be considered constitutionally deficient (although the Court has not found any such deficiency) and finds that the state court was correct in concluding that any errors did not result in a trial which was fundamentally unfair or unreliable. Because Petitioner failed to establish deficiency and harm under *Strickland*, the Court will deny his claim of ineffective assistance with respect to the guilt/innocence phase of the trial.

IV. TRIAL COUNSEL'S CONFLICT OF INTEREST

Petitioner argues that trial counsel's friendship with Nelson Finch, a banker at Castle Hills National Bank, created a conflict of interest that adversely affected his performance in representing Gosch. Defense counsel testified at the evidentiary hearing that Nelson Finch was "one of the principals at the Castle Hills National Bank" and that counsel believed that Finch "put up part of the reward or one of his entities or organizations put up part of the reward." E.H. Vol. I at 98-100. Defense counsel related that he had avoided talking about the reward situation with Finch because of defense counsel's friendship with Finch and because Mr. Patton worked for Finch. *Id.* Gosch now argues that this constituted an actual conflict of interest which resulted in a violation of his Sixth Amendment right to counsel.

Respondent argues that Gosch did not exhaust this claim in state court and, therefore, the

claim cannot be heard in this Court. Moreover, Respondent argues that a state court may not consider the merits of, or grant relief on, claims presented for the first time in a successive state habeas application absent some showing of cause or actual innocence. As a result of this, Respondent argues, petitioner has procedurally defaulted and federal review is barred. In Gosch's reply, he argues that he did exhaust this claim by asserting it in his proposed findings of fact and conclusions of law and that, in any event, his failure to exhaust should be excused. Additionally, Gosch argues that he should not be subject to procedural default because of the law concerning default and abuse of the writ as it existed in 1994.

The Court finds it needlessly cumbersome to decide whether his claim was exhausted or defaulted because, in any event, his claim is wholly without merit.[5] Where a petitioner argues that his trial counsel had an actual conflict of interest, he need not establish a showing of actual prejudice under *Strickland*. *See Perillo v. Johnson*, 79 F.3d 441, 448 (5th Cir. 1996). Rather, under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), he must merely show an "adverse effect." *Id.* To prove an adverse effect, a petitioner need not show that the conflict changed the outcome of the trial. *Id.* But "to show adverse effect, a petitioner must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of a conflict of interest." *Id.* at 449. However, this more lenient standard applies *only* in multi-party representation conflicts (that is, where an attorney has a conflict between two clients). *Beets v. Scott*, 65 F.3d 1258, 1268-72 (5th Cir. 1995) (en banc), *cert. denied*, 116 S.Ct. 1547 (1996).

The Court finds that Petitioner has not stated a claim under either *Cuyler* or *Strickland*

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[5] *See* 28 U.S.C. § 2254(b)(2) (West Supp. 1997) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.")

because he has not shown the existence of an actual conflict which resulted in an adverse effect in that "some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest." *Perillo*, 79 F.3d at 449. Gosch has claimed only that defense counsel's friendship with Finch kept defense counsel from interviewing Finch about the reward. Gosch has offered no indication of what defense counsel, unfettered by such a relationship, might have uncovered. Neither has Gosch made any showing that Finch was the only, or even an important, source of information concerning the reward and Hurst's interest in it. Because Gosch has not established any adverse effect that resulted from defense counsel's failure to interview Finch, his claim does not merit relief under *Strickland* or *Cuyler*.

V. CLAIM OF INEFFECTIVE ASSISTANCE DURING PENALTY PHASE

Petitioner claims that defense counsel rendered ineffective assistance during the penalty phase of his trial because he failed to investigate and present relevant mitigating evidence in support of a life sentence and he deliberately elicited inculpatory testimony concerning Gosch's confession to other robberies and his illegal possession of a submachine gun. First, Petitioner complains that defense counsel presented only two witnesses on behalf of Gosch during the penalty phase: Preston Knodell, a friend, and Wesley Gosch, Petitioner's grandfather and adoptive father. Moreover, Petitioner alleges that defense counsel failed to investigate other readily available records (concerning his attendance at therapy sessions following an explosion in his home which resulted in the loss of an eye and several fingers) and witnesses such as counselors, friends, family, colleagues or Eagle Scout leaders and members. Petitioner also states that defense counsel failed to make a relevant and meaningful closing argument at the punishment phase in that he did not convey to the jury "an individualized sense of the fully rounded person Mr. Gosch was and is."

Petition at 117.

With respect to this allegation, the state court held that "[i]n order to establish that trial counsel was ineffective due to the lack of an adequate investigation, a habeas petitioner must demonstrate what should have been found and how that would have altered the case[]'s outcome." Order at 50 (citing *Anderson v. Collins*, 18 F.3d 1208 (5th Cir. 1994), *Lockhart v. McCotter*, 782 F.2d 1275 (5th Cir. 1986), and *Alexander v. McCotter*, 775 F.2d 595 (5th Cir. 1985)). This is an appropriate articulation of *Strickland's* prejudice prong as it relates to the facts of this case. Applying the law to the facts, the state court found that petitioner "wholly failed in his burden of proof" because he failed to establish what mitigating evidence defense counsel would have found had he conducted a more extensive investigation. Order at 50. Although given an opportunity at the evidentiary hearing to present evidence on this claim, Petitioner "presented no evidence to support his claim that a more thorough investigation by [defense counsel] would have revealed beneficial information regarding the special issues." *Id.* Rather, the state court found that defense counsel consulted the petitioner about potential mitigating evidence concerning the deliberateness of the crime (relevant to the first special issue) and decided that there was no evidentiary basis for arguing that Mrs. Patton's death was not the result of a deliberate act. *Id.* The state court additionally found that although Petitioner referred to numerous facts of what purported to be of a mitigating nature, he never presented evidence to support those allegations. *Id.* These findings are reasonable determinations of the facts as evidenced by the record.

Moreover, the Court notes that the record indicates that defense counsel attempted to find other witnesses to offer mitigating testimony but declined to call them because their testimony might back-fire on cross-examination and he did not want to add harm to Gosch's case. Failure of counsel

to present certain mitigating evidence during the sentencing phase is not, *per se*, ineffective; the Fifth Circuit has found that where counsel decides not to offer certain mitigating evidence because it would "open the door" for damaging cross-examination, such action is not ineffective assistance. *See Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997), *Williams v. Collins*, 16 F.3d 626, 632 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). Because, as the state court found in its adjudication on the merits, Petitioner did not establish either deficiency or harm under *Strickland*, the Court must deny relief on this claim.

Petitioner also claims that defense counsel rendered ineffective assistance when he elicited inculpatory evidence concerning other acts tending to show Gosch's future dangerousness (the second special issue). Specifically, Petitioner argues that after objecting strenuously to the introduction of Gosch's confession to robberies and after the State voluntarily agreed not to attempt to offer Gosch's statement to the jury, defense counsel nevertheless offered the same confession into evidence. The Court cannot ascertain whether this claim was presented to the state court as the state court did not address its merits and Petitioner does not cite to the record from the state court's habeas review. In Gosch's current petition he cites merely to the trial's statement of facts; he does not cite to any evidence concerning this claim that was adduced at the evidentiary hearing. On the Court's review of the trial's statement of facts, it cannot discern that "Exhibit No. 102" is, as Petitioner asserts, the confession discussed. Moreover, it appears to the Court from the trial's statement of facts that it was during Wesley Gosch's direct examination by Woods that *Wesley Gosch* discussed the pharmacy robberies in response to being asked about Gosch's friendship with Rogers. Statement of Facts, Vol. 9 at 253. If Exhibit No. 102 was Gosch's confession, Woods's introduction of it during the penalty phase may have been calculated to explain Wesley Gosch's

comments and support his belief that it was Rogers who encouraged Petitioner to commit illegal acts. However, because Petitioner failed to establish facts at the state court's evidentiary hearing that would show counsel's deficiency and any harm, this claim must be denied.

Additionally in a claim not addressed by the state court, Petitioner points to defense counsel's behavior when the prosecution sought to have admitted a submachine gun found at Rogers's apartment and testimony that the gun belonged to Gosch. The Court overruled the defense's motion to suppress the weapon, but the State offered to limit the witness's testimony to the fact that Gosch admitted ownership of the gun and to refrain from going into the additional allegation that the weapon had been stolen by Gosch. Defense counsel, however, stated sarcastically that he was "offended by the whole proceeding[, but] if you're going to get in one part, get the whole thing in." Statement of Facts, Vol. 9 at 218-19. Although the State did not elicit the theft on direct examination, defense counsel did elicit testimony that the serial numbers on the gun showed that the gun was owned by Don's gun shop. *Id.* at 225. Petitioner argues that this testimony suggested that Gosch had stolen the gun. However, this is only one interpretation. According to defense counsel's testimony at the evidentiary hearing, his strategy on cross-examination was to "muddy the waters" by showing that the gun did not belong to Gosch. E.H. Vol. II at 71-76. Petitioner argues that this was not effective because it had already been established that the gun was found in the apartment and was, therefore, connected to Gosch. However, as defense counsel explained at the evidentiary hearing, it was not Gosch's apartment, so at the time of his cross-examination he believed that pointing to the gun shop's legal ownership of the gun did not hurt Gosch. *Id.* at 76. Despite the fact that defense counsel thought better of this decision during the evidentiary hearing nine years later, it is his decision in the heat of the trial that matters. Counsel's decision to discuss the legal

ownership of the gun was within the "wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 668-89. Moreover, Petitioner has not shown that this testimony caused such harm that his trial was fundamentally unfair.

In examining the purported errors, in their totality, by trial counsel in his presentation of evidence during the punishment phase, the Court concludes, as did the state court, that Petitioner has not demonstrated that his counsel's performance was outside the bounds of reasonable trial strategy and has not produced mitigating evidence which undermines the reliability of the sentence such that counsel's errors resulted in harm as contemplated by *Strickland*.

VI. ADMISSION OF PRIOR UNADJUDICATED OFFENSES DURING THE PUNISHMENT PHASE

In Gosch's sixth ground for relief, he argues that the admission of evidence of unadjudicated offenses at the punishment phase of his trial violates the Fifth, Eighth and Fourteenth Amendments.[6] First, he argues that the admission of such evidence violates equal protection because such evidence is not admissible in assessing punishment in non-capital cases. Gosch also argues that the admission of this evidence violates his right to due process because (1) the failure to require proof of these offenses beyond a reasonable doubt rendered his death sentence unreliable and (2) Gosch was denied adequate notice of the extraneous offenses introduced against him.

The Fifth Circuit has previously rejected these arguments. Where another petitioner argued that the admission of unadjudicated extraneous offenses during the sentencing phase of his trial violated the eighth and fourteenth amendments because (1) the admission undermines the reliability

[6]The evidence consisted of the following: (1) testimony that suggested that Gosch was illegally in possession of a submachine gun, (2) testimony that Gosch was injured in an explosion which Gosch himself caused in his father's home, and (3) three disciplinary offenses committed by Gosch while incarcerated prior to trial (possession of a bundle of match heads wrapped in toilet paper, possession of a large paper clip, and throwing of a toilet brush handle out of a window).

of the death sentence, (2) the state was not required to prove the extraneous offenses beyond a reasonable doubt, and (3) the admission violates equal protection because such offenses cannot be introduced in non-capital trials, the court found that "the use of evidence of unadjudicated extraneous offenses, at the sentencing phase of Texas capital murder trials, does not implicate constitutional concerns." *Harris v. Johnson*, 81 F.3d 535, 540-41 (5th Cir.), *cert. denied*, 116 S.Ct. 1863 (1996); *see also Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.), *cert. denied*, 484 U.S. 935 (1987). The court found first that "the authorities do not support [the] claim that the Constitution requires that the state prove unadjudicated offenses beyond a reasonable doubt before they may be used during the sentencing phase." *Harris*, 81 F.3d at 541. Second, the court noted that "[a]ssuming *arguendo* that capital defendants and non-capital defendants are similarly situated, a parallel of which we are not persuaded, any disparate treatment would be rationally related to the state's legitimate interest in assuring that *all* relevant information is presented for consideration by a capital jury in the discharge of its onerous obligation." *Id.* (citing *Williams v. Lynaugh*, 814 F.2d at 207-208).

Gosch also claims that the State's failure to formally notify him of the extraneous offenses it planned to introduce violated due process because it constituted "unfair surprise." Although the Fifth Circuit has previously found "no authority for requiring the state to notify the defendant before offering this admissible evidence," *Landry v. Lynaugh*, 844 F.2d 1117, 1121 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988), Petitioner points to *Williams v. State* which held that "absent a showing of unfair surprise, proof of unadjudicated, extraneous offenses at the 'sentencing proceeding' of a capital case is admissible." 622 S.W.2d 116, 120 (Tex. Crim. App. 1981) (en banc), *cert. denied*, 455 U.S. 1008 (1982).

Despite the fact that Petitioner did not exhaust this claim in state court and did not establish the facts supporting the claim of "unfair surprise" in the state court's evidentiary hearing, he now seeks to have a federal evidentiary hearing on this claim. AEDPA provides that

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Petitioner has made no showing under this standard for why he should receive an evidentiary hearing in this Court on a claim which was known at the time of both his direct appeal and his state habeas review. For all of the above reasons, the Court will deny this claim and the request for an evidentiary hearing.

VII. CLAIM THAT EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY FAILURE OF TEXAS COURTS TO APPLY *GEESA V. STATE* RETROACTIVELY AND REVERSE GOSCH'S CONVICTION

Gosch claims that he is entitled to benefit from the new rule announced in *Geesa v. State*, 820 S.W.2d 154, 162-163 (Tex. Crim. App. 1991) because when the "new rule" was announced, his case was pending on direct appeal. In *Geesa*, the Court of Criminal Appeals announced a new rule requiring a definition of the term "reasonable doubt" in jury instructions in criminal trials. *Id.* The

state court also announced that the new rule would only have limited prospective application (application to Geesa himself and all cases coming to trial after *Geesa*). *Id.* Gosch argues that *Geesa* was based on federal law and, therefore, *Griffith v. Kentucky*, 479 U.S. 314 (1987) requires that the rule be given retroactive treatment. However, the Fifth Circuit has flatly rejected this claim. In *Lackey v. Scott*, the Fifth Circuit held that "the rule announced in *Geesa* was not required by the federal constitution or law." 28 F.3d 486, 491 (5th Cir. 1994) (citing *Victor v. Nebraska*, 114 S.Ct. 1239 (1994) (stating that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so") and *Thompson v. Lynaugh*, 821 F.2d 1054, 1060-61 (5th Cir.), *cert. denied*, 483 U.S. 1035 (1987) (noting that "attempts by trial courts to define 'reasonable doubt,' have been disfavored by this Court")), *cert. denied*, 513 U.S. 1086. "Thus," the Fifth Circuit held, "the federal retroactive principles discussed in *Griffith* have no bearing on the state's application of its new rule." *Lackey*, 28 F.3d at 491 (also denying petitioner's equal protection argument since he "ha[d] not made any attempt to show . . . that the state did not have a rational basis for its refusal to apply the rule of *Geesa* retroactively").[7] Therefore, the Court will deny relief on this claim.

VIII. CLAIM THAT THE PUNISHMENT PHASE JURY INSTRUCTIONS MISLED THE JURY REGARDING THE EFFECT OF A SINGLE "NO" VOTE

Gosch claims that his eighth amendment rights were violated by the statutory prohibition against informing jurors of the effect of a failure to agree on a punishment phase issue. The Texas capital sentencing statute provides that the court shall charge the jury that they may not answer any of the punishment phase issues "yes" unless they agree unanimously and that they may not answer any issue "no" unless ten or more jurors agree. Although the sentencing statute requires a life

[7]At this point, the Court wishes to admonish Petitioner's counsel for their failure to cite *Lackey* in their Petition to this Court. The fact that counsel's client is under a death sentence does not relieve counsel of their ethical obligation to cite authority which is both directly contrary to their position and binding on this Court.

sentence to be assessed when jurors are unable to agree on a response to a submitted issue, it specifically prohibits the court or the attorneys for the state or defendant from informing a juror of the effect of the failure to agree on a submitted issue. Gosch argues that failing to inform the jury of the effect of failing to agree is unconstitutional because jurors may have been encouraged to view their "no" votes as worthless unless joined by nine others, and, believing that they must return a verdict one way or another, they may have conformed to the majority decision to answer "yes" to the special issues. Petitioner bases his argument on *Mills v. Maryland*, 486 U.S. 367, 384 (1988) which reversed a death sentence because "the jury instructions and verdict form created a substantial probability that reasonable jurors . . . well may have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular circumstance."

Although, once again, Petitioner does not cite relevant Fifth Circuit case law, the Fifth Circuit has squarely rejected Petitioner's claim. First, as in *Webb v. Collins*, 2 F.3d 93, 95 (5th Cir. 1993), this Court cannot grant this claim in any event because it would constitute the creation of a new rule on collateral review, a course of action which is prohibited by *Teague v. Lane*, 489 U.S. 288 (1989). Moreover, the Fifth Circuit has indicated that it would reject this claim on the merits. *See Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir.) (holding that the claim "lacks substantive merit as the instruction at issue is wholly dissimilar to that involved in *Mills*"), *cert. denied*, 117 S.Ct. 150 (1996); *Jacobs v. Scott*, 31 F.3d 1319, 1328 (5th Cir. 1994) (finding that the claim was procedurally barred, but finding that "[h]is substantive argument is meritless" because the Texas system does not preclude the entire jury from considering a mitigating circumstance and, thus, *Mills* is inapplicable), *cert. denied*, 513 U.S. 1067 (1995). For these reasons, Petitioner's claim is denied.

IX. CLAIM THAT THE SECOND SPECIAL ISSUE WAS UNCONSTITUTIONALLY VAGUE

Petitioner complains that the special issues presented to the jury are unconstitutionally vague because of the failure to define operative terms such as "deliberate," "probability," "criminal acts of violence," and "continuing threat to society." Once again, in cases never cited by Petitioner's counsel, the Fifth Circuit has repeatedly rejected this claim. *See Woods v. Johnson*, 75 F.3d 1017, 1033-34 (5th Cir. 1996) (noting its frequent rejection of this argument because the Texas punishment phase issues do not function as aggravating circumstances and are not vague; citing *Jurek v. Texas*, 428 U.S. 262, 268-72 (1976) which likewise rejected the vagueness challenge); *Milton v. Procunier*, 744 F.2d 1091, 1095-96 (5th Cir. 1984) ("deliberately," "probability," and "criminal acts of violence" "have a plain meaning of sufficient content that the discretion left to the jury" is "no more than that inherent in the jury system itself"), *cert. denied*, 471 U.S. 1030 (1985); *Thompson v. Lynaugh*, 821 F.2d 1054, 1060 (5th Cir.) ("deliberately" and "reasonable doubt" need not be defined as their "common meaning is sufficiently clear to allow the jury to decide the special issues on punishment"), *cert. denied*, 483 U.S. 1035 (1987); *James v. Collins*, 987 F.2d 1116, 1119-20 (5th Cir.) (not necessary to define "deliberately," "probability," "criminal acts of violence," or "continuing threat to society"), *cert. denied*, 509 U.S. 947 (1993). Petitioner's ninth claim is denied.

X. CLAIM THAT GOSCH'S EXECUTION WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT BECAUSE HE HAS BEEN SUBJECTED TO REPEATED EXECUTION SETTINGS

Gosch claims, as he did in his first motion for stay of execution, that the repeated setting of his execution constitutes cruel and unusual punishment such that the state may not now execute Petitioner. Initially, the Court notes its agreement with Respondent that this claim is not cognizable on federal habeas review because it addresses only whether, while in custody, Gosch's constitutional

rights have been violated. The relevant and only proper inquiry in a federal habeas action is whether Gosch is in custody in violation of the constitution. Assuming that the Court found some violation of Gosch's civil rights while he has been in custody, Petitioner would not be entitled to relief from his capital conviction because, by asserting this claim, he is not challenging the validity of his conviction or sentence.

In any case, Petitioner's claim, that the psychological trauma inherent in being subjected to repeated execution settings now renders the execution of his sentence unconstitutional, is without merit. In *State of Louisiana ex rel. Francis v. Resweber*, the Supreme Court found a similar claim meritless:

> Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution.

329 U.S. 459, 464 (1947). No court has recognized repeated execution settings as cruel and unusual punishment. In fact, some courts have explicitly rejected this claim. *See McKenzie v. Day*, 57 F.3d 1493 (9th Cir.) (*en banc*) (court rejected petitioner's argument that a twenty-year delay between the conviction and the date of execution "combined with the repeated resetting of his execution date (8 times)" amounted to cruel and unusual punishment), *cert. denied*, 514 U.S. 1104 (1995); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir.) (under the abuse of writ doctrine, court dismissed petitioner's claim that executing him after 15 years on death row during which time he had faced at least seven execution dates would constitute cruel and unusual punishment; court noted that "there is no reported federal case that has adopted [petitioner's] position"), *cert. denied*, 515 U.S. 1173 (1995).

Additionally, many courts have rejected the similar argument that lengthy delays in carrying out an execution constitute cruel and unusual punishment. *See Lackey v. Scott*, 52 F.3d 98 (5th Cir.) (although *Teague v. Lane*, 489 U.S. 288, 310 (1989) precluded review on the merits, court vacated a stay of execution granted by district court on claim that executing him after 17 years' incarceration on death row would be cruel and unusual punishment), *stay granted, cert. dismissed*, 115 S.Ct 1818 (1995); *Fearance v. Scott*, 56 F.3d 633, 637-38 (5th Cir.) (rejecting Eighth Amendment "delay of execution" claim under abuse of writ doctrine and noting that "it is unclear to us whether, even if it were held that delay in the imposition of the death penalty constitutes cruel and unusual punishment, commutation of the death penalty will turn out to be the appropriate remedy") (quoting *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir.), *opinion adopted*, 57 F.3d 1493 (*en banc*), *cert. denied*, 115 S.Ct. 1840 (1995)), *cert denied*, 115 S.Ct. 2603 (1995); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir.) (also rejecting similar claim on procedural grounds but addressing the merits in dicta by stating that there are compelling justifications for the delay between conviction and execution: the state's interest in deterrence and swift punishment must compete with its interest in insuring that those executed receive fair trials with constitutionally mandated safeguards), *cert. denied*, 117 S.Ct. 275 (1996); *Free v. Peters*, 50 F.3d 1362 (7th Cir.) (rejecting claim that to execute petitioner after almost two decades of pursuing appeals and collateral relief is cruel and unusual punishment), *cert. denied*, 115 S.Ct. 1397 (1995); *Richmond v. Lewis*, 948 F.2d 1473, 1491-92 (9th Cir. 1990) ("It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place."), *rev'd on other grounds*, 503 U.S. 958 (1992), *vacated*, 986 F.2d 1583 (9th Cir. 1993). Although these courts faced claims that were raised in successive petitions

for writs of habeas corpus, their reasoning indicates that even without the procedural bar, they would have found the claims meritless. *See White*, 79 F.3d at 439-40. For these reasons, Petitioner's claim of cruel and unusual punishment is DENIED.

CONCLUSION

As Petitioner has failed to establish any of his claims, the Court will DENY habeas relief. Moreover, because it has fully addressed the merits of Gosch's petition and finds that there is no factual dispute which, if resolved in favor of Petitioner, would entitle Petitioner to relief, the Court will GRANT Respondent's motion for summary judgment. Petitioner's other motions will be addressed in a separate order.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 12th day of January, 1998.

John D. Rainey

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

CHAPTER 153—HABEAS CORPUS

Sec.
2241. Power to grant writ.
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2255. Federal custody; remedies on motion attacking sentence.
[2256. Omitted.]

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Chapter catchline was changed by Senate amendment. See 80th Congress Senate Report No. 1559.

Codifications

The table of sections for chapter 153 was amended by Pub.L. 95-598, Title II, § 250(b), Nov. 6, 1978, 92 Stat. 2672, effective June 28, 1984, pursuant to Pub.L. 95-598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, as amended by Pub.L. 98-249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub.L. 98-271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub.L. 98-299, § 1(a), May 25, 1984, 98 Stat. 214; Pub.L. 98-325, § 1(a), June 20, 1984, 98 Stat. 268, set out as an Effective Dates note preceding section 101 of Title 11, Bankruptcy, by adding:

"2256. Habeas corpus from bankruptcy courts.".

Section 402(b) of Pub.L. 95-598 was amended by section 113 of Pub.L. 98-353, Title I, July 10, 1984, 98 Stat. 343, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 250(b) of Pub.L. 95-598, effective June 27, 1984, pursuant to section 122(e) of Pub.L. 98-353, set out as an Effective Dates note under section 151 of this title.

Section 121(a) of Pub.L. 98-353 directed that section 402(b) of Pub.L. 95-598 be amended by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28, 1984". This amendment was not executed in view of the prior amendment to section 402(b) of Pub.L. 95-598 by section 113 of Pub.L. 98-353.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and

each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. (June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 451, 452, 453 (R.S. §§ 751, 752, 753; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Feb. 13, 1925, c. 229, § 6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of Title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words "for the purpose of an inquiry into the cause of restraint of liberty" in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts. 80th Congress House Report No. 308.

1949 Acts. This section inserts commas in certain parts of the text of subsection (b) of section 2241 of Title 28, U.S.C., for the purpose of proper punctuation.

1966 Acts. Senate Report No. 1502, see 1966 U.S. Code Cong. and Adm. News, p. 2968.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.
(June 25, 1948, c. 646, 62 Stat. 965.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 454 (R.S. § 754).

Words "or by someone acting in his behalf" were added. This follows the actual practice of the courts, as set forth in *United States ex rel. Funaro v. Watchorn*, C.C.1908, 164 F. 152; *Collins v. Traeger*, C.C.A.1928, 27 F.2d 842, and cases cited.

The third paragraph is new. It was added to conform to existing practice as approved by judicial decisions. See *Dorsey v. Gill* (App.D.C.) 148 F.2d 857, 865, 866. See also *Holiday v. Johnston*, 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Changes were made in phraseology, 80th Congress House Report No. 308.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.
(June 25, 1948, c. 646, 62 Stat. 965.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755–761).

Section consolidates sections 455–461 of Title 28, U.S.C., 1940 ed.

The requirement for return within 3 days "unless for good cause additional time, not exceeding 20 days, is allowed" in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20

miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words "unless for good cause additional time is allowed" in the fourth paragraph, were substituted for words "unless the party petitioning requests a longer time" in section 459 of Title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology. 80th Congress House Report No. 308.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, c. 646, 62 Stat. 965; Nov. 2, 1966, Pub.L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have consistently refused to entertain successive "nuisance" applications for habeas corpus. It is derived from H.R.4232 introduced in the first session of the Seventy-ninth Congress by Chairman Hatton Sumners of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See *Dorsey v. Gill*, 1945, 148 F.2d 857, 862, in which Miller, J., notes that "petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nineteen persons have presented 597 petitions—an average of 5." 80th Congress House Report No. 308.

Section amended to modify original language which denied Federal judges power to entertain application for writ where legality of detention had been determined on prior application and later application presented no new grounds, and to omit reference to rehearing in section catch line [sic] and original provision authorizing hearing judge to grant rehearing. 80th Congress, Senate Report No. 1559, Amendment No. 45.

1966 Acts. Senate Report No. 1797, see 1966 U.S. Code Cong. and Adm. News, p. 3663.

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. This section makes no substantive change in existing law. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing law and promotes uniform procedure. 80th Congress House Report No. 308.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change. 80th Congress House Report No. 308.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Derived from H.R. 4232, Seventy-ninth Congress, first session. It is declaratory of existing law and practice. 80th Congress House Report No. 308.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Derived from H.R. 4232, Seventy-ninth Congress, first session. At common law the return was conclusive and could not be controverted but it is now almost universally held that the return is not conclusive of the facts alleged therein. 39 C.J.S. pp. 664-666, §§ 98, 99. 80th Congress House Report No. 308.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised. If the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.
(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Derived from H.R. 4232, Seventy-ninth Congress, first session. It conforms to the prevailing practice in habeas corpus proceedings. 80th Congress House Report No. 308.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.
(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Derived from H.R. 4232, Seventy-ninth Congress, first session. It conforms to the prevailing practice. 80th Congress House Report No. 308.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.
(June 25, 1948, c. 646, 62 Stat. 966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 465 (R.S. § 766; Mar. 3, 1893, c. 226, 27 Stat. 751; Feb. 13, 1925, c. 229, § 8(c), 43 Stat. 940; June 19, 1934, c. 673, 48 Stat. 1177).

Provisions relating to proceedings pending in 1934 were deleted as obsolete.

A provision requiring an appeal to be taken within 3 months was omitted as covered by sections 2101 and 2107 of this title.

Changes were made in phraseology, 80th Congress House Report No. 308.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.
(June 25, 1948, c. 646, 62 Stat. 967.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 462 (R.S. § 762).

Section 462 of Title 28, U.S.C., 1940 ed., was limited to alien prisoners described in section 453 of Title 28, U.S.C., 1940 ed. The revised section extends to all cases of all prisoners under State custody or authority, leaving it to the justice or judge to prescribe the notice to State officers, to specify the officer served, and to satisfy himself that such notice has been given.

Provision for making due proof of such service was omitted as unnecessary. The sheriff's or marshal's return is sufficient.

Changes were made in phraseology. 80th Congress House Report No. 308.

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).
(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub.L. 104–132, Title I, § 102, 110 Stat. 1217.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 463(a) and 466 (Mar. 10, 1908, c. 76, 35 Stat. 40; Feb. 13, 1925, c. 229, §§ 6, 13, 43 Stat. 940, 942; June 29, 1938, c. 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of Title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of Title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of Title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology. 80th Congress House Report No. 308.

1949 Acts. Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1951 Acts. Senate Report No. 1020, see 1951 U.S. Code Cong. and Adm. Service, p. 2578.

1996 Acts. Senate Report No. 104–179 and House Conference Report No. 104–518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under

the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S.Ct. 448, 321 U.S. 114, 88 L.Ed. 572.) 80th Congress House Report No. 308.

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Senate Revision Amendments

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

1966 Acts. Senate Report No. 1797, see 1966 U.S. Code Cong. and Adm. News, p. 3663.

References in Text

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts

Pub.L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1234, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules Governing Proceedings Under Sections 2254 and 2255 of this Title

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub.L. 94-349, set out as a note under section 2074 of this title.

CROSS REFERENCES

Rules Governing Section 2254 Cases in the United States District Courts are set out ante, following the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H.R. 4233, Seventy-ninth Congress. 80th Congress House Report No. 308.

1949 Acts. This amendment conforms language of section 2255 of Title 28, U.S.C., with that of section 1651 of such title and makes it clear that the section is applicable in the district courts in the Territories and possessions.

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

References in Text

Section 408 of the Controlled Substances Act, referred to in text, is classified to section 848 of Title 21, Food and Drugs.

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings For United States District Courts

Pub.L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions [sections 2254 and 2255 of this title] under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of this Title

Rules and forms governing proceedings under this section and section 2254 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub.L. 94-349, set out as a note under section 2074 of this title.

CROSS REFERENCES

Rules Governing Section 2255 Proceedings in the United States District Courts are set out ante, following the Rules Governing Section 2254 Cases in the United States District Courts.

[§ 2256. Omitted]

HISTORICAL AND STATUTORY NOTES

Codifications

This section as added by Pub. L. 95-598, Title II, § 250(a), Nov. 6, 1978, 92 Stat. 2672, effective June 28, 1984, pursuant to Pub. L. 95-598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, as amended by Pub. L. 98-249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub. L. 98-271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub. L. 98-299, § 1(a), May 25, 1984, 98 Stat. 214; Pub. L. 98-325, § 1(a), June 20, 1984, 98 Stat. 268 [set out as an Effective Dates note preceding section 101 of Title 11, Bankruptcy], read as follows:

§ 2256. Habeas corpus from bankruptcy courts

A bankruptcy court may issue a writ of habeas corpus—

(1) when appropriate to bring a person before the court—

(A) for examination;

(B) to testify; or

(C) to perform a duty imposed on such person under this title; or

(2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if—

(A) such debtor was arrested or imprisoned on process in any civil action;

(B) such process was issued for the collection of a debt—

(i) dischargeable under title 11; or

(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ.

Section 402(b) of Pub. L. 95-598 was amended by section 113 of Pub. L. 98-353 Title I, July 10, 1984, 98 Stat. 343, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 250(a) of Pub. L. 95-[illegible], effective June 27, 1984, pursuant to section 122(e) of Pub. L. 98-353, set out as an Effective Dates note under section 151 of this title.

Section 121(a) of Pub. L. 98-353 directed that section 402(b) of Pub. L. 95-598 be amended by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28 1984". This amendment was not executed in view of the prior amendment to section 402(b) of Pub. L. 95-598 by section 113 of Pub. L. 98-353.

Prior Provisions

A prior section 2256, added Pub. L. 95-144, § 3, Oct. 28, 1977, 91 Stat. 1220, which related to jurisdiction of proceedings relating to transferred offenders, was transferred to section 3244 of Title 18, Crimes and Criminal Procedure, by Pub. L. 95-598, Title III, § 314(j), Nov. 6, 1978, 92 Stat. 2677.

CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Sec.
2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.
2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.
2263. Filing of habeas corpus application; time requirements; tolling rules.
2264. Scope of Federal review; district court adjudications.
2265. Application to State unitary review procedure.
2266. Limitation periods for determining applications and motions.

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners

under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings. (Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1221.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Effective Dates

1996 Acts. Section 107(c) of Pub.L. 104-132 provided that: "Chapter 154 of title 28, United States Code (as added by subsection (a)) [this chapter] shall apply to cases pending on or after the date of enactment of this Act [Apr. 24, 1996]."

§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b). (Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1222.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Effective Dates

1996 Acts. Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub.L. 104-132, set out as a note under section 2261 of this title.

§ 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

(Added Pub.L. 104–132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104–179 and House Conference Report No. 104–518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Effective Dates

1996 Acts. Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub.L. 104–132, set out as a note under section 2261 of this title.

§ 2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

(Added Pub.L. 104–132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104–179 and House Conference Report No. 104–518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Effective Dates

1996 Acts. Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub.L. 104–132, set out as a note under section 2261 of this title.

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to "an order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

(Added Pub.L. 104–132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104–179 and House Conference Report No. 104–518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Effective Dates

1996 Acts. Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub.L. 104–132, set out as a note under section 2261 of this title.

§ 2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30–day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120

days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

(Added Pub.L. 104–132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1224.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104–179 and House Conference Report No. 104–518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

Effective Dates

1996 Acts. Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub.L. 104–132, set out as a note under section 2261 of this title.

APPENDIX F

Death row inmate's lawyers had close call

They scrambled at last minute to find court to halt execution

By Michael Graczyk
Associated Press

HUNTSVILLE, Texas — Convicted killer Lesley Gosch came within about 20 minutes of execution early Friday when defense attorneys had unusual difficulties finding a court to issue a routine reprieve during a last-day legal frenzy.

Mr. Gosch, 38, was condemned to die for fatally shooting Rebecca Patton, the wife of a San Antonio-area banker, at her home during an extortion attempt in 1985.

State attorneys never opposed defense applications for a reprieve, and Mr. Gosch had not completed the usual appeals process, yet his attorneys had to scramble from court to court as time was running out before they managed to halt the execution.

"It's not what we've seen before," Bill Zapalac, an assistant Texas attorney general, said of the unusual last-day denials. "But, certainly, the courts are saying, 'We don't need to grant a stay. This issue is not one that warrants further review.' And they've got citations to back that up."

"I think everyone was shocked and surprised at the developments," Steve Hall, a spokesman for the Texas Resource Center, which arranges legal help for death row inmates, said Friday. "It made me wonder if we were really witnessing just a fundamental breakdown in the system because of the overwhelming load of these death penalty cases. He could easily have been executed."

Texas has executed 14 killers this year, the most in the nation and the most lethal injections in single year. The 68 executions since the state resumed capital punishment in 1982 also are the most in the country.

Texas has nearly 370 inmates on death row, making it the nation's largest.

Mr. Hall estimated more than 60 of them have no attorneys, a situation Mr. Gosch was in until Thursday.

"I think one aspect of this is it does call into question the review given these cases," he said. "These are very complex cases, and each one is individual. And there are so many cases. They eat up so many resources of the state, of defense attorneys, the resources of the courts. And there is an overwhelming burden of these cases on all the players in the criminal justice system."

Texas Resource Center attorneys went to federal and state courts Thursday in an effort to get Mr. Gosch's lethal injection blocked but were rebuffed by at least four state and federal courts, some of them more than once.

Finally about 11:30 p.m., — nearly 20 minutes before Mr. Gosch was scheduled to be strapped to the death chamber gurney and prepared for injection — U.S. District Judge H.F. Garcia of San Antonio granted a stay.

Judge Garcia had rejected two earlier appeals, but he said new, unresolved legal questions presented to him deserved review.

"Hopefully this case will really serve as a wake-up call to the crisis of death penalty representation in Texas, but there's no guarantee," Mr. Hall said.

Mr. Gosch, reported by prison officials as nervous throughout the evening, was told of the reprieve by a warden as he waited in a small holding cell a few feet from the death chamber.

"He was pretty happy and said, 'Thank you, thank you,' " said prison spokesman Charles Brown.

Prosecutors said Mr. Gosch masing scheme. Testimony showed he planned to abduct Mrs. Patton for ransom so he could leave the country and avoid a prison sentence for a federal firearms conviction.

Mrs. Patton called her husband, Frank, president of Castle Hills National Bank, the afternoon of Sept. 18, 1985, and put a man on the phone who demanded that Mr. Patton fill a briefcase with $50 and $100 bills.

Mr. Patton called police, but his wife was found dead in her home. She had been shot six times in the head.

Mr. Gosch and John Rogers were arrested for the slaying and extortion attempt. Mr. Rogers testified against Mr. Gosch and received a 45-year prison term.

Inmate gets stay half-hour before execution scheduled

HUNTSVILLE (AP) — A federal judge who twice refused to halt the execution of a Texas death row inmate granted a stay Thursday night about a half-hour before the prisoner was to die by injection.

U.S. District Judge H.F. Garcia of San Antonio issued the stay around 11:30 p.m. for convicted killer Lesley Lee Gosch, attorneys for the inmate said.

Attorneys had worked frantically through the night trying to win a stay for Gosch, who had been scheduled to die after midnight Thursday.

Garcia's order said attorneys had brought up "numerous claims that have not previously been presented to this court."

Gosch, 38, had been scheduled to die by injection for the 1985 slaying of Rebecca Patton at her San Antonio area home.

He was convicted of fatally shooting Mrs. Patton, the wife of a San Antonio banker, during an extortion attempt.

About two hours before Gosch was to be executed, the Texas Court of Criminal Appeals refused to halt the punishment.

Gosch

Earlier, State District Judge Ed L. Marin in Bexar County rejected an appeal. Instead, Garcia said the Texas Resource Center, which arranges legal help for death row inmates, should handle the case.

"Mr. Gosch has not had an attorney to work on his legal appeals, but Gosch and federal courts have moved forward with his execution," Jay Jacobson, executive director of the American Civil Liberties Union of Texas, said Thursday. "To an unfortunate, rank 3x judgment, Lesley Gosch also hears many from execution with only a cursory review of serious questions in his case."

Also rejecting Thursday, the judge ordered the appointment of an outside attorney but denied a stay of execution, setting off a flurry of legal activity.

Gosch appealed. That refusal came on the heels of another rejection from the 5th U.S. Circuit Court of Appeals in New Orleans.

Attorneys went to the Supreme Court late Thursday night about the court refused to grant a rehearing in the case. The appeal before the Supreme Court was pending when Garcia issued his order.

The legal maneuvers began Wednesday when Garcia denied a stay of execution and denied a writ of habeas corpus to overturn Gosch's conviction and death sentence. The judge also refused a request from the Texas Resource Center to name an attorney for legal prep had rejected to represent Gosch in his appeals.

Death penalty foes blasted the late scramble to win a reprieve, saying it represented a new low in Texas' distinction as the nation's leader in capital punishment.

"Gosch has not been through either the state or federal appeals process," Leigh Dingerson, director of the National Coalition to Abolish the Death Penalty, said. "His case has only been through a direct appeal. He also has not had a lawyer for the duration of his time on death row. This guy has not been heard on his appeals."

Gosch would have been the fifth inmate to be executed in Texas this year, a record for lethal injections.

"Texas justice is routinely danger of reversing itself in the speedy application of fair laws," Jacobson said.

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Petition for Writ of Certiorari, Motion for Leave to Proceed *In Forma Pauperis*, and Motion for Stay of Execution were served on counsel for Respondent by facsimile transmission to: Michael Skotnik, Capital Litigation Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 15th day of January, 1998. I further certify that all parties required to be served have been served.

Raoul Schonemann

RAOUL D. SCHONEMANN
ATTORNEY
P.O. BOX 280 AUSTIN, TX 78767
TELEPHONE (512) 320-8300 FAX (512) 477-2153

FAX TRANSMISSION

To: Chris Vasil
United States Supreme Court
Washington, D.C.

Date: January 15, 1998

Fax #: (202) 479-3026

Pages: 136 total, including this cover sheet.

Subject: Lesley Lee Gosch v. Gary L. Johnson

Mr. Vasil:

Kindly accept the following pleadings -- including a Motion for Leave to Proceed In Forma Pauperis, a Motion for Stay of Execution, and a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (with attached appendices) -- accompanying this cover sheet for lodging with the United States Supreme Court in the above-captioned capital case.

Early yesterday evening, we sent a Notice of Appeal for immediate filing with the federal district court, and an Application for Certificate of Appealability and a Motion for Stay of Execution for immediate filing with the Fifth Circuit. Your office should have received copies of these documents last night by fax. Please let me know if there was any problem with the transmission.

Due to the length of this fax, I will send it in installments. I apologize that we were unable to assemble these materials for Federal Express delivery last night. Please accept my apologies for the inconvenience.

Sincerely,

Raoul Schonemann

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioner Lesley Lee Gosch, an indigent, respectfully moves this Court for leave to file the attached Petition for Writ of Certiorari without costs and to proceed *in forma pauperis* in this Court. An affidavit of indigency is attached hereto.

Respectfully submitted,

MAURIE LEVIN*
Texas Bar No.00789452
Member, Supreme Court Bar

RAOUL SCHONEMANN*
Texas Bar No. 00786233

P.O. Box 280
Austin, TX 78767
512.320.8300
512.477.2153[fax]

*Counsel of Record

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Motion for Leave to Proceed *In Forma Pauperis* was served on counsel for Respondent by facsimile transmission to: Michael Skotnik, Capital Litigation Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 15TH day of January, 1998. I further certify that all parties required to be served have been served.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

LESLEY LEE GOSCH,	§
	§
Petitioner,	§
	§
-v-	§
	§
GARY JOHNSON, Director,	§
Texas Dept. of Criminal Justice,	§
Institutional Division,	§
	§
Respondent.	§
	§

AFFIDAVIT IN SUPPORT OF A MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Lesley Lee Gosch being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes__ No✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.
   September of 1995 / $800.00/mo.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes__ No✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes✓ No__

   If the answer is yes, state the total value of the items owned. $2300.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes__ No✗

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are depending upon you for support and state your relationship to those persons.
   None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Lesley Lee Gosch

Subscribed and sworn to before me this 11th day of 12 1997.

S. Taylor
Notary

My commission expires: S. TAYLOR NOTARY PUBLIC STATE OF TEXAS My Commission Expires 6-27-99

CERTIFICATION OF INMATE ACCOUNT

I hereby certify that the above named inmate, Lesley Gasch, has on this date the following funds on account in this institution: $ 13.91.

Tina Caldwell 12/11/97

Name: Tina Caldwell
Ellis I Unit
Texas Department of Criminal
Justice, Institutional Division
Huntsville, Texas

No. 97-7521
A-511

RECEIVED
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

LESLIE LEE GOSCH,
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the Director Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, Respondent,[1] and files this Brief in Opposition.

OPINION BELOW

The Fifth Circuit denied Gosch's motions for certificate of appealability and stay

[1] For clarity, Respondent will be referred to as "the Director" and Petitioner Rogelio Rangel Hernandez as "Hernandez."

of execution on January 15, 1998. *Gosch v. Johnson*, No. 98-40042 (5th Cir. Jan. 15, 1998).

JURISDICTION

Gosch seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Gosch bases his claims upon the Supremacy Clause, Eighth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of Petitioner Lesley Lee Gosch ("Gosch") pursuant to a judgment and sentence of the 290th District Court of Bexar County. Gosch is scheduled to be executed on January 15, 1998. By an indictment filed on January 8, 1986, in Cause No. 86-CR-0010, Gosch was charged in the 290th District Court of Bexar County, Texas, with capital murder in violation of Section 19.03 of the Texas Penal Code. On June 30, 1986, Gosch's motion for change of venue was granted, and the case was transferred to the 24th District Court of Victoria County, Texas. Following a jury trial on the merits, which commenced on August 19, 1986, Gosch was found guilty of capital murder on September 2, 1986. After hearing additional evidence relating to punishment, the jury on September 4, 1986, affirmatively answered the two special issues presented pursuant to Article 37.071 of the Texas Code of Criminal Procedure.[2] In accordance with state law, the court imposed the death sentence.

[2] Pursuant to the provisions of Article 37.071 of the Texas Code of Criminal Procedure applicable at the time of Gosch's trial, the following two special issues were submitted to the jury:

Gosch appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed on December 18, 1991. *Gosch v. State*, 829 S.W.2d 775 (Tex. Crim. App. 1991). Gosch's motion for rehearing was denied on February 26, 1992. The United States Supreme Court denied certiorari relief on June 28, 1993. *Gosch v. Texas*, 509 U.S. 922, 113 S.Ct. 3035 (1993). Thereafter, the trial court scheduled Gosch's execution for on or before sunrise on September 17, 1993.

Without filing any pleading in the trial court, Gosch filed a motion for stay of execution to permit filing of an application for habeas corpus relief in the Texas Court of Criminal Appeals. No application for writ of habeas corpus was filed in any state court. The Court of Criminal Appeals denied the motion for stay of execution on September 13, 1993.

Still without attempting to obtain collateral relief in the state courts, Gosch on September 14, 1993, initiated a habeas action in the United States District Court for the Western District of Texas, San Antonio Division, pursuant to 28 U.S.C. §§ 2241, 2254. On September 15, 1993, the district court entered final judgment denying habeas relief.

Subsequently, on September 16, 1993, Gosch filed a motion to alter or amend judgment and to reconsider denial of motion for stay of execution. When this motion was denied, Gosch timely filed a notice of appeal. Thereafter, the district court issued a certificate of probable cause to appeal. A panel this court affirmed the judgment of the federal district court denying relief and denying a stay of execution. *Gosch v.*

1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of Rebecca Smith Patton would result?
2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Collins, No. 93-8635 (5th Cir. Sept. 16, 1993).

Also on September 16, 1993, following the Fifth Circuit's affirmance, Gosch filed an application for state habeas relief. The 226th District Court in Bexar County, Texas, recommended denial of relief. That evening, the Texas Court of Criminal Appeals denied Gosch state habeas relief. *Ex Parte Gosch*, No. 25-370-01 (Tex. Crim. App. Sept. 16, 1993). Shortly before midnight, September 16, 1993, Gosch filed a second federal habeas action in the United States District Court for the Western District of Texas. The federal district court granted a stay of execution pending disposition of the second petition.

On September 20, 1993, the district court *sua sponte* raised the question whether it had jurisdiction to consider the federal petitions. Following court-ordered briefing by the parties, the court on October 12, 1993, dismissed the first petition for want of jurisdiction, vacated the stay of execution, and, in the alternative, dismissed Gosch's second petition as an abuse of the writ. The Director filed a notice of appeal from the jurisdictional ruling to the United States Court of Appeals for the Fifth Circuit, and Gosch filed a cross-appeal with respect to the ruling in the abuse of the writ.

On October 19, 1993, the state trial court rescheduled Gosch's execution for April 15, 1994. On April 7, 1994, the United States Court of Appeals for the Fifth Circuit dismissed the petitions for writ of habeas corpus that had been filed in the United States District Court for the Western District of Texas on the basis of lack of subject matter jurisdiction, ruling that jurisdiction for habeas corpus petitions in Gosch's case lies only in the United States District Court for the Southern District of Texas.

Confronted with an imminent execution date of April 15, 1994, the Fifth Circuit on April 6th also ordered that, if Gosch intended to seek federal habeas relief, he must file his petition no later 5 p.m. on Thursday, April 7th. Following a motion for

rehearing, the Fifth Circuit on April 8th modified this order to provide that Gosch must file his federal petition by noon on Monday, April 11th. *Gosch v. Collins*, Nos. 93-8635 and 93-8780 (5th Cir. Apr. 8, 1994), *cert. denied*, *Gosch v. Scott*, 513 U.S. 836, 115 S.Ct. 116 (1994). Gosch did not file a federal petition in the Southern District of Texas until the instant petition, filed December 30, 1997.

On April 12, 1994, Gosch filed his second application for state habeas relief. The state court subsequently granted a stay of execution. Gosch's second state application was supplemented on October 14, 1994. On June 5-7, 1995, the 226th District Court, Bexar County, Texas, held an evidentiary hearing on the allegations in Gosch's second application for state habeas relief. On May 14, 1997, that court entered an order recommending that relief be denied. On September 10, 1997, the Texas Court of Criminal Appeals denied habeas relief. *Ex Parte Gosch*, No. 25,370-02 (Tex. Crim. App. Sept. 10, 1997). On October 10, 1997, the 226th District Court set an execution date of January 15, 1998. On November 21, 1997, the Texas Court of Criminal Appeals denied Gosch's request for a stay of execution. Gosch filed his instant application for federal habeas relief on December 30, 1997. The United States District Court, Southern District of Texas, Victoria Division, denied habeas relief and Gosch's motion for a stay of execution on January 12, 1998. Gosch filed a motion for certificate of appealability ("COA") with the district court on January 13, 1998. That court denied COA on January 14, 1998. That same day, Gosch filed a motion to alter and amend judgment, or in the alternative reopen judgment ("motion to alter"). That motion was denied on January 14, 1998.

In the evening of January 14, 1998, Gosch file a motion for certificate of appealability and motion for stay of execution in the Fifth Circuit Court of Appeals. That court denied all claims. *Gosch v. Johnson*, No. 98-40042 (5th Cir. Jan. 15, 1998).

B. Statement of Facts

1. Guilt-Innocence Phase

The evidence was summarized by the Court of Criminal Appeals as follows:

Accomplice Testimony

> The accomplice witness, Rogers, was a long-time acquaintance of appellant. At some point in 1984, Rogers lived with appellant and appellant's girlfriend, a woman named Georgina. In August of 1985, appellant told Rogers that he was concerned about going to federal prison on a weapons violation conviction. Appellant felt that it would not be "constructive" for him to be imprisoned for this offense and sought to have Rogers aid him in fleeing the country. The two originally planned to rob a bank but Rogers rejected this alternative as "too risky and too violent."
>
> The two then discussed a second alternative--that being kidnapping and ransoming the wife of a bank president. Appellant informed Rogers that he knew of two potential targets in the Alamo Heights area of San Antonio and, in the latter part of August of 1985, appellant began to focus on a specific target for his extortion scheme. In the latter part of August or early September of 1985, appellant first mentioned the name of Frank Patton as a potential target for the extortion plan.
>
> Approximately two weeks later, Rogers and appellant began to formalize their scheme. They drove by the Patton home in early September to ascertain whether the plan could be completed safely. In mid-September appellant and Rogers began to take steps to carry out their plans. They planned that appellant was to gain access to the Patton home under the guise of delivering flowers to Rebecca Patton. After entering the home, appellant was to bind his victim with duct tape and then take her to a secluded, rural area of Bexar County. Rogers' role was to go to North Star Mall

> and wait for Frank Patton to arrive with a ransom payment. Originally, this scheme was to begin on September 16, 1985.
>
> On September 15, 1985, appellant and Rogers made a dry run by the Patton residence. On September 16, at approximately 8:30 a.m., Rogers picked up appellant at the Windsor Park Mall's "Park and Ride." The two then drove to a Stop and Go convenience store located in the 500 block of Austin Highway near Alamo Heights. There Rogers purchased a soft drink along with a pastry and appellant bought a carton of milk. After leaving the store, Rogers and appellant drove around the Pattons' neighborhood to determine whether there was much activity on the streets and whether Rebecca Patton's automobile was parked at the home.
>
> While driving around the neighborhood, Rogers began having second thoughts. Rogers felt that they should carry out their plan another day because of problems with his car. Appellant was angered by Rogers' position; nevertheless, he agreed to cancel plans for that day. The two agreed to try again the next day, September 17, 1985. Rogers and appellant then left Alamo Heights.
>
> On the 17th of September, Rogers again rendezvoused with appellant at the Park and Ride. The pair once again drove to the same Stop and Go convenience store on Austin Highway. Once again Rogers' lack of courage and his misgivings about his automobile caused the operation to be postponed. The two agreed to try the next day.
>
> On September 18th, Rogers once again met appellant at the Park and Ride. They once again visited the Stop and Go convenience store on Austin Highway. Rogers and appellant then returned to the Pattons' neighborhood. After satisfying themselves that Mrs. Patton was at home, the two drove to Rogers' apartment so that appellant could change

his shirt. At Rogers' apartment, appellant changed out of a camouflage shirt and into a blue one belonging to Rogers' one-time roommate, Stephen Hurst. Rogers made a phone call (at approximately 10:30 a.m.) to the Patton residence to determine if Mrs. Patton was home alone. Rogers also called the bank where Mr. Patton worked. Rogers was informed that Mr. Patton was in a meeting; Rogers stated that he would call back. After calling the bank, Rogers and appellant returned to Alamo Heights.

Rogers drove appellant to the Pattons' neighborhood and dropped him off in the vicinity of the Patton home. Appellant left the car with a flower box containing a .22 caliber pistol, a black silencer and a roll of duct tape. Rogers then drove around the block twice; on the second trip around the block, Rogers saw appellant walking toward the bus stop. At this point Rogers picked up appellant. Appellant informed Rogers that no one had answered the door at the Patton home. The two drove around looking for a pay telephone. After finding one, appellant called the Patton home and spoke with Rebecca Patton. He told her that he was from a nursery and that he had sent a man to the house who was unable to deliver some flowers. Mrs. Patton apologized saying she had been unable to hear the door because she had been vacuuming.

At some point between 1:00 p.m. and 2:00 p.m., Rogers again called the Castle Hills bank and asked to speak with Frank Patton. Rogers used the fictitious name of Mr. Anderson in this second call and hung up as soon as Frank Patton answered the phone. After making his call to the bank, Rogers drove appellant back to the Pattons' neighborhood and once again dropped him off in the vicinity of their home. Rogers then drove to a liquor store with a pay telephone and waited for appellant to call.

Rogers stood by the phone for approximately twenty minutes awaiting appellant's call. The call never came; instead, appellant came running back to the phone booth.

Upon seeing Rogers, appellant stated, "There was no need to go get the money because [I] killed her."

When appellant got into the car, he removed the .22 caliber pistol, silencer and duct tape from the waistband of his blue jeans. The two drove back to appellant's apartment. At that time, appellant gave Rogers a black bag containing the Ruger automatic, two silencers, another handgun and some ammunition. Appellant also gave Rogers a bag containing appellant's shirt and shoes. Rogers placed all these items in the trunk of his car and returned to his apartment. With the exception of the shoes, Rogers took these items, along with a pair of gloves belonging to appellant, to his apartment. Rogers examined the murder weapon at the apartment and determined that it was no longer loaded. Rogers put the two pistols, the two silencers and the ammunition into a brown attache case and gave it to Stephen Hurst that evening. Rogers asked Hurst to take the weapons and put them up out of the way, or, as he phrased it, "put them in the deep freeze."

On the day after the murder, Rogers picked up appellant at the Wonderland Mall and they returned to Rogers' apartment. Appellant lived at Rogers' apartment until the two were arrested on September 25, 1985.

Non-accomplice Testimony

At approximately 11:00 a.m. on September 18, Sherry Satel, Rebecca Patton's friend, was talking with her over the phone. At some point in their conversation, Rebecca told Sherry that she had another call. She put Sherry on hold and came back on the line a "few seconds" later. Mrs. Patton told Mrs. Satel that someone had called to tell her they would be coming to her home to deliver some flowers. Mrs. Patton was puzzled about who might be sending her flowers. This phone conversation continued until approximately 12:30 p.m.

Sherry Covarrubias related that in September of 1985

she was employed by Stop and Go convenience stores in San Antonio. She was assigned to work the Stop and Go at 506 Austin Highway in Alamo Heights. According to Covarrubias, on September 18 appellant came into her store with a "heavy set" man who was taller than appellant (this individual was later identified as appellant's accomplice John Rogers). Covarrubias stated she recalled appellant because she had a conversation with him regarding the thick lenses on his glasses, and because he had been in the store a couple of times in the week prior to September 18th.

On September 18th, at approximately 2:25 p.m., Mrs. Patton called her husband on his private line at the bank. According to Frank Patton's secretary from the Castle Hills National Bank, Jo Ann Galindo, Mrs. Patton seemed to be in a strange frame of mind. Galindo felt that Mrs. Patton was acting unusually abrupt and unfriendly over the phone. Mrs. Patton told Galindo that she needed to speak to Frank; the secretary put the call on hold and informed Frank Patton that his wife was on the telephone. Moments later, Frank Patton waved Galindo into his office and began to write a note for her trying to explain that there was an extortion threat. Galindo left the office immediately and called the FBI. Another cashier began getting the ransom money together. According to Galindo, at approximately 12:30 that same day, an individual by the name of Mr. Anderson had called and asked to speak with Frank Patton.

Frank Patton testified that he was the president of the Castle Hills National Bank in San Antonio. He had been married to Rebecca for seventeen years. On the morning of September 18th, Frank and his wife jogged around the neighborhood before he left for the bank. Shortly after lunch, his wife called the bank; Mr. Patton's secretary answered. When he took the call, his wife told him "there is someone here that has to talk to you." At that point, a male voice came over the phone and informed Mr. Patton that, "I want you to get some money together in a briefcase."

The caller told Mr. Patton he wanted it in "fifties" and "hundreds." The caller also informed Mr. Patton that the money was to be taken to the picnic area of North Star Mall. While listening to the call, Mr. Patton called the secretary into his office and began to write "extortion threat" on a piece of paper for her to see. Mr. Patton asked how much money the caller wanted. The caller told him to bring "as much as you can get in a brief case." Before hanging up, the caller informed Mr. Patton that he had "forty-five minutes to get the money there, or it will all be over."

Shortly after the extortion call, members of the Castle Hills police department arrived at the bank and informed Mr. Patton that his wife was dead. In an attempt to catch the murderer, Mr. Patton went to the picnic area of North Star Mall and stood by the pay phone for an hour. No one came.

According to Mr. Patton's testimony, he met appellant at Chris Catham's sailboat shop in San Antonio in June of 1985. At that time he informed appellant that he was a bank president in San Antonio. He gave appellant a business card.

Officer Dornak of the Alamo Heights police department was one of a number of law enforcement officers who were dispatched to the Patton home on the afternoon of September 18th. According to Officer Dornak, the rear door of the Patton home was locked with a dead-bolt. There were no signs of a disturbance.

Officer David Anderson, an investigator with the San Antonio police department, testified that he was also dispatched to the Patton home to collect and preserve any available evidence. Officer Anderson obtained seven spent shell casings found near the body. Another investigator with the San Antonio police department, Officer David DeLuna, testified that he recovered three bullet fragments also near Mrs. Patton's body. Officer Giles Fortson Alamo Heights police department testified that he was the first law

enforcement officer to gain entry to the Patton home. When he arrived, Mrs. Patton's body was still "warm to the touch."

Dr. Vincent DeMaio, Chief Medical Examiner of Bexar County, testified that Rebecca Patton had been shot six times in the head. DeMaio recovered the bullet fragments from the skull of the deceased and turned them over to a firearms examiner. According to DeMaio, Rebecca Patton died as a result of multiple gunshot wounds to her head.

Roger Terry, police chief for the city of Alamo Heights, related that on September 25th an individual named Stephen Hurst gave him a brown briefcase. In the briefcase there were two silencers, a .22 caliber Ruger semi-automatic pistol and three boxes of Eley ammunition. Terry took the silencers and the . 22 caliber pistol to the Bexar County medical examiner's office for the purpose of having ballistic tests run on those items. After obtaining these items, the police procured a search warrant for the apartment of John Rogers. Appellant was arrested during the execution of this warrant.

Texas Ranger Bob Steele also assisted in the search of Rogers' apartment. According to Steele, during the execution of the search warrant police officers found appellant in the apartment and promptly arrested him. Rogers had left the apartment prior to the execution of the warrant and was arrested approximately one mile from the residence. During the search, officers found a number of books and newspapers--one of the books told how a person could change his or her identity and the newspapers contained articles about the Patton murder. Officers also found a crumpled, handwritten note containing the following notation:

"Long-Term Strategic Goals: 1. New I.D. w/ complete history. $100 K to $200 K U.S. Cash 3. Closed File on Old I.D."

Allen Southmayd, a forensic document examiner from the Bexar County Regional Crime Laboratory, testified that he made a handwriting comparison between a job application filled out by appellant, a "bill of sale" also filled out by appellant and the "Things To Do" note found in the Glendale apartment. Southmayd concluded that appellant wrote the "Things To Do" note.

Officers also recovered a pair of blood splattered blue jeans from the apartment; and, in Rogers' automobile, they found a pair of black gloves, a map of Belize and a story on the nation of Belize along with a birth certificate belonging to Chris Catham. Jayne Nellis, a forensic serologist with the Bexar County Regional Crime Laboratory, testified that appellant had type "O" blood, while Rebecca Patton had type "A" blood. Nellis also conducted a test on the blood found on the blue jeans seized at the Glendale apartment; this test revealed that the jeans were smeared with type A human blood.

Richard Stengel, a firearms examiner with the Bexar County Regional Crime Laboratory, testified that he performed forensic tests on the Ruger .22 caliber semiautomatic pistol, the two silencers, the bullet fragments that Dr. DeMaio had removed from the skull of the deceased, and the spent shell casings found next to the body. According to Stengel, the ammunition used in the murder was Eley ammunition. Stengel was also able to determine, through test firing of the weapon, that the Ruger .22 caliber pistol was the murder weapon used to cause the death of Rebecca Patton.

Special Agent Larry Swisher of the United States Treasury Department's Bureau of Alcohol, Tobacco and Firearms testified that, according to the Bureau's firearms transaction records, the murder weapon (Ruger pistol, Mark II, .22 caliber, serial number 21097013) was purchased at Don's Gun Sales in San Antonio. The State introduced a document showing that the pistol was purchased in the name

of Randall Wroblewski.

Randall Wroblewski testified that he had been appellant's friend for approximately ten years. Wroblewski related that he had a conversation with appellant concerning appellant's up coming sentencing hearing in federal court. According to Wroblewski, appellant stated, "[i]f I walk in, I'm not walking out, so I'm not going to show up." Appellant also told Wroblewski that if the FBI ever inquired about him (appellant), Wroblewski was not to mention appellant's association with Rogers. Wroblewski also testified that when he purchased the Ruger .22 caliber pistol at Don's Gun Sales he was purchasing it for appellant. Wroblewski related that he paid for the pistol but he immediately gave it to appellant who kept it thereafter. Wroblewski identified State's Exhibit Number 52 as the pistol which he purchased at appellant's request.

The owners of Don's Gun Sales, Don and Leslie Carter, testified that on Labor Day of 1985 appellant visited their home for the holiday weekend. At that time appellant informed Leslie that he owned a .22 caliber Ruger pistol.

One of Rogers' acquaintances, Stephen Hurst, testified that during the late summer and early fall of 1985, he was living with Rogers at Rogers' apartment in San Antonio. According to Hurst, on September 18th, at approximately 5:00 p.m., Rogers gave him a brown briefcase containing three pistols and two silencers. Included among the pistols was a .22 caliber Ruger (identified at trial as the murder weapon). Later that same day, Hurst took the briefcase, containing the weapons and silencers, to the home of John Howells. Howells returned the briefcase with the .22 Ruger to Hurst on September 25th, after which Hurst turned the briefcase and its contents over to the Alamo Heights police department.

John David Howells, a friend of Stephen Hurst and John Rogers, testified that on the day Rebecca Patton was

murdered Hurst came to his home. Hurst brought with him the brown briefcase. The briefcase was locked with a combination lock. Howells did not know the combination. Howells kept the briefcase until the following Monday, at which time John Rogers took it for "two or three" hours. Later that Monday, Howells retrieved the briefcase from Rogers and kept it until the following Wednesday. On that day, Howells returned the briefcase to Stephen Hurst. According to Howells, on the morning before Hurst came to get the briefcase, Hurst had given him the combination to the lock on the briefcase. When Howells opened it, he found that it contained two silencers, a .22 caliber pistol, a couple of boxes of shells and some small rubber disks.

Chris Catham, the owner of Sweetwater Sailcraft, testified that he had known appellant for approximately four years. Appellant worked on a contract basis with Catham until April of 1985 at which time Catham hired appellant to work for an hourly wage. At the time he was hired as a full time employee, appellant filled out and signed an employment application. One of appellant's duties at Sweetwater Sailcraft was to answer the telephone and make a log of incoming phone calls. That telephone log contained an entry from July 12, 1985, which read, "Frank Patton needs to pick up trailer." Catham also identified a birth certificate that he had kept in his sailboat shop office. Catham testified that appellant had free access to the office where the birth certificate was kept. (As mentioned above, the police found Chris Catham's birth certificate in Rogers' automobile on September 30, 1985.)

Jorge Valdez was one of appellant's co-workers from the sailboat shop. While working there, appellant introduced Valdez to Frank Patton. At that time, appellant informed Valdez that Patton was the president of a bank. Henry Holly testified that he had also worked with appellant at the Sweetwater Sailcraft Shop in San Antonio. In early September of 1985, appellant told Holly that he was

> concerned about his upcoming sentencing in a San Antonio federal court. Two days after the murder, on September 20, 1985, appellant asked Holly if he could help him get to Belize by giving him a ride to McAllen.
>
> The defense offered no testimony and closed immediately after the State.

Gosch v. State, 829 S.W.2d at 777-82.

2. Punishment Phase

In 1973, Gosch pled guilty and was convicted of two robberies by assault of Bexar County pharmacies. He received ten-year probated sentences in each. His codefendant in the commission of the offenses was John L. Rogers.

In August 1985, Gosch pled guilty in the United States District Court to the manufacture and sale of a silencer. He did not report for his original sentencing hearing on September 20, 1985, but was sentenced on October 25, 1995.

There was also evidence of three disciplinary infractions committed by Gosch while he was incarcerated prior to the capital trial. In December, 1985, a bundle of match heads the size of a fist was found wrapped in toilet paper in his cell. 9 SR 126-29. In January, 1986, Gosch was taken four or five blocks from the county jail to the office of an eye doctor. There, he picked up a paper clip and attempted to hide it in his hand. 9 SR 131-38. Finally, he hid in his cell a wooden commode brush handle, which can be fashioned into a weapon. 9 SR 138-44.

Robert Ellis, commander of the San Antonio Police Department bomb squad, investigated the explosion at Gosch's home, in which Gosch lost the fingers on his left hand. According, to Ellis, he found nitroglycerine and other explosive compounds in the garage, two jars of picric acid in the house, and nitroglycerine in the bedroom where the explosion occurred. A few days later, at Gosch's father's request, Ellis

returned to the home that Gosch shared with his father and retrieved two homemade blasting caps and one small jar each of picric acid and lead azide. 9 SR 174-182.

Finally, through the testimony of FBI Agent Vandaloo, an HNK submachine gun with a suppressor and a magazine were identified as belonging to Gosch and having been found under a bed in Rogers' apartment. 9 SR 220-225.

Two witnesses testified on Gosch's behalf. Preston Kendall, a former co-worker at Marquis Electric Car, described Gosch as easy going and non-violent. 9 SR 230. This assessment of Gosch's nature was shared by his father, Wesley Gosch. According to Wesley Gosch, Gosch's fascination with explosives was short lived and his interest in guns was in their craftmanship not in their use. 9 SR 241-269.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THE COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons. Gosch has failed to advance a compelling reason for review of this case, and none exists. Further, the issue in this case involves only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

GOSCH IS NOT ENTITLED TO A FULL YEAR TO LITIGATE HIS CLAIMS FOR HABEAS RELIEF, AND THE STATE OF TEXAS HAS A LEGITIMATE

INTEREST IN CARRYING OUT GOSCH'S DEATH SENTENCE.

Gosch argues that Congress, through the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), signed into law in 1996, has precluded the State of Texas from setting an execution date within the AEDPA's one-year limitation period in which federal habeas petitioner's may seek relief. Gosch, though couching this claim in terms of federal preemption doctrine and the Supremacy Clause, is in effect merely arguing that when Congress set a one-year time limit on the filing of applications for federal habeas relief, *see* 28 U.S.C. § 2244(d), an entitlement was thereby created which guarantees such petitioners a period of one year from the date upon which their convictions become final, with any applicable tolling periods applied, in which to file a petition for federal habeas relief. Gosch extends this argument to assert that any efforts by the state to schedule an execution within this one-year period are preempted by Congress' action in passing the aforementioned statute. This argument is without merit.

The district court below correctly analogized Gosch's argument to *Byrne v. Roemer*, 847 F.2d 1130 (5th Cir. 1988), where the petitioner complained about the State's setting of an execution date within the ninety-day period in which he was entitled to file a petition for certiorari. The court there held that Byrne had "at most, a right to petition for certiorari which must be exercised within ninety days and a right to a procedure through which execution of a judgment may, if the procedure is utilized, be halted during the certiorari process." *Id.* at 1134-35. The Fifth Circuit held that the Louisiana statute at issue, which set Byrne's execution date during the ninety-day period in which he could file for certiorari, "simply d[id] not affect any 'right' which the federal statute confer[red]." *Id.*

Likewise, in Gosch's case, the district court held that "to the extent that [the] AEDPA creates a right to seek review that may be exercised during the one-year period, the Texas practice of setting execution dates within that period simply does not affect any right conferred by [the] AEDPA." *Gosch v. Johnson*, No. V-97-126, 3 (Order of United States District Court, Southern District of Texas, Victoria Division, Dec. 19, 1997).

A natural extension of Gosch's claim that the AEDPA entitles him to a full year in which to file his federal habeas petition would be that he is likewise entitled to a stay of execution over the span of that year. Such a reading of the statute would fly in the face of *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983). Gosch is not entitled to a stay of execution unless he can make a substantial showing of a denial of a federal right. *Id.* In reviewing an application for a stay of execution, the court must consider:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of a stay would serve the public interest.

Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988), *quoting Streetman v. Lynaugh*, 835 F.2d. 1521, 1524 (5th Cir. 1988). Although the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities [*i.e.* the other three factors] weighs heavily in favor of granting the stay.'" *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir.) (*quoting O'Bryan v. McKaskle*, 729 F.2d

991, 993 (5th Cir. 1982), *cert. denied*, 465 U.S. 1013, 104 S. Ct. 1015 (1984)), *cert. denied*, 483 U.S. 1036, 108 S. Ct. 6 (1987).

III.

THAT GOSCH HAS HAD THREE EXECUTION DATES SET OVER THE PERIOD OF HIS INCARCERATION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Gosch alleges that the State of Texas has forfeited its right to execute him, pursuant to the Eighth Amendment, due to the suffering he has undergone in connection with previously scheduled execution dates and due to the length of time he has spent on death row. He claims that to carry out his sentence at this time would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Essentially, Gosch is advancing the argument that the State of Texas cannot execute him because he was subjected to procedures and conditions, associated with his imprisonment and the legal scheduling of his execution dates, that render his execution unconstitutional.

Contrary to Gosch's elaborate assertions of mistreatment while in prison, his claim does not entitle him to federal habeas relief. Even if the challenged conduct violated Gosch's constitutional rights, the violation would not entitle him to federal habeas relief because it does not affect the validity of his conviction or sentence and is, therefore, not cognizable in federal habeas review. 28 U.S.C. § 2254. In the alternative, while the Director denies Gosch's allegations of improper treatment, Gosch's claims, even if true, do not rise to the level of a violation of his Eighth Amendment rights. Similar claims were recently considered and rejected by the Fifth

Circuit Court of Appeals in *White v. Johnson*, 79 F.3d 432 (5th Cir.), *cert. denied*, 117 S.Ct. 275 (1996), and *Lackey v. Scott*, 83 F.3d 116 (5th Cir.), *cert. denied*, 117 S.Ct. 276 (1996). *See also, Lackey v. Scott*, 28 F.3d 486, 492 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 743 (1995). Of the two prongs of this Eighth Amendment claim, the length of time on death row and suffering caused by incarceration and stayed executions, Lackey and White chose to emphasize the length of time, while Gosch emphasizes the number of stayed executions. The shift in focus of Gosch's claim, however, does not negate the fact that it has been presented to and rejected by the Fifth Circuit. In any event, this claim is without merit and, as determined by the Circuit Court of Appeals in *White* and *Lackey*, the granting of relief would require this Court to announce and apply a new rule of constitutional law on collateral review in contravention of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060.

A. Gosch's treatment during incarceration does not affect the validity of his conviction or sentence and, thus, does not establish a basis for federal habeas relief pursuant to 28 U.S.C. § 2254(a).

Initially, even if Gosch's allegations of mistreatment could be established, and even assuming *arguendo* that his constitutional rights were violated *during his incarceration*, he is not entitled to federal habeas relief from his capital conviction on this basis because he does not challenge the validity of his conviction or his sentence. "When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. §2254, it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Coleman v. Thompson*, 501 U.S. 722, 730111 S.Ct. 2546, 2554 (1991), *quoting* § 2254.

It is a very different question that Gosch has asked this Court to resolve. Gosch

questions whether, *while in custody*, his constitutional rights have been violated. The relevant inquiry in a federal habeas action is whether Gosch is *in custody* in violation of the constitution--not whether *while in custody* his rights were violated. This Court has no jurisdiction to grant federal habeas relief on the basis Gosch asserts for relief. This Court exercises no "supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *See, e.g., Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940 (1982). This authority is limited to the review of *convictions* obtained in violation of the Constitution. *Id.* "'Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Id., quoting Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400 (1973). Accordingly, federal habeas inquiry into whether Gosch's rights were violated *during his incarceration* is unauthorized in a proceeding pursuant to 28 U.S.C. § 2254.

The single case in which the Court has addressed the *manner* of carrying out a sentence as a basis for habeas relief *rejected* the theory advocated by Gosch that the suffering involved in carrying out his death sentence implicated his constitutional rights.[3] *See State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S.

[3] To be sure, Gosch cites *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and the Superintendent of Prisons, Saint Catherine's, Jamaica*, Privy Council Appeal No. 10 of 1993 (Judgment of the Lords of the Judicial Committee of the Privy Council, delivered November 2, 1993), for the proposition that a delay in the carrying out of a death sentence could be cruel. Of course, this is authority from a foreign jurisdiction, which is without precedential effect in the court of the United States--and for good reason: the cited authority involves a country with a different constitution and legal system. In fact, the relief granted in that case was due to the failure of the government to carry out the executions in an expeditious manner *as provided by the law of that jurisdiction*. Here, by contrast, any delay was due to the fact that

459, 464, 67 S.Ct. 374, 376 (1947). In *Resweber*, the Supreme Court held,

> Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely . . . We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty. (emphasis added).

State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al., 329 U.S. at 464, 67 S.Ct. at 376. The Court, in turn, upheld the Louisiana Supreme Court's decision that *Resweber* failed to allege a violation of state or national law in any of his petitions. *Id.* at 465-466, 67 S.Ct. at 377. Once again, the Court has directed litigants that the necessary suffering involved in any method employed to extinguish life humanely is not a constitutional issue.

B. Gosch's claim is barred by Teague v. Lane.

Additionally, because this case is on collateral review, Gosch may not obtain relief based a rule of constitutional law that has yet to be announced, or that was announced after his conviction became final on June 23, 1993. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 Gosch's request to extend federal habeas corpus relief to include challenges to the conditions of confinement, rather than the fact of confinement

Gosch was challenging his conviction on appeal and in habeas proceedings, not due to the government's dilatoriness.

is clearly a novel rule of constitutional magnitude. *Preiser v. Rodriguez*, 411 U.S. at 498-99, 93 S.Ct at 1840-1841. Similarly, Gosch's request to apply the holding of a Jamaican case, *see* note 22 *supra*, to the facts in the present case would require the announcement of a new rule of constitutional law setting time limits on a state's right to execute a convicted capital murderer. To the extent that Gosch's claim can be interpreted as including the allegation that, in addition to the conditions of his confinement, his rights have been violated by the length of time he has spent on death row, his claim is correspondingly barred by the principles announced in *Teague v. Lane*. *Id.* Gosch does not address the *Teague* bar in his pleadings on this issue. Nevertheless, for the sake of expediency, should the issue be addressed by Gosch in a subsequent reply in which he may argue his claim falls within a *Teague* exception, the Director will take this, the earliest opportunity, to demonstrate the argument lacks merit.

First, *Teague* allows for the retroactive application of a new rule "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.*, 489 U.S. at 307, 109 S.Ct. at 1073. The new rule sought by Gosch seeks to circumscribe government conduct alone, and as such, does not fall within this exception.

The second exception to the *Teague* bar is reserved for "absolute prerequisites to fundamental fairness that is 'implicit in the concept of ordered liberty.'" 489 U.S. at 314, 109 S.Ct. at 1077. The rule Gosch seeks is clearly inapplicable to this exception. *Id.*

If Gosch were to assert that it would be improper to apply the *Teague* bar to his claim because the claim did not arise until after his case was affirmed on direct appeal, this attempt to escape the rigors of the *Teague* bar would be unyeilding. Gosch would

have to explain why the claim did not arise until after his conviction became final. This position seems to directly contradict the authority upon which he relies, *Pratt & Morgan*, which would hold that any delay between the imposition of a death sentence and its execution beyond five years would be presumptively cruel and inhumane. If such is the case--or if he at any time felt that the slow progression of his appeal was creating an additional burden on him--he could have certainly modified his strategy of bringing his claims in a piecemeal fashion or in the alternative, complained to the Court of Criminal Appeals. Gosch could have filed a motion to expedite or some other motion to inform the court that he was claiming he had a constitutional right to an expeditious resolution of is claims on appeal.[4]

Finally, the concerns underlying the nonretroactivity rule of *Teague* are to provide an incentive for "trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards", while recognizing "that interests of comity and finality must also be considered in determining the proper scope of habeas review." 489 U.S. 306-08, 109 S.Ct. at 1073-74. No basis existed at the time the Court of Criminal Appeals reviewed Gosch's claims on direct appeal--or now, for that matter--which could have possibly informed it that Gosch had constitutional right to an expeditious review. *See Lackey v. Scott*, 28 F.3d at 492. Moreover, not only was there not any authority for Gosch's claim, Gosch never informed the court of the claim until after his direct appeal had been exhausted and his

[4] Although there is no basis for stating such a request to expedite his appeal would not have been received and considered by the Court of Criminal Appeals, even had they chose to ignore such a request. Gosch could have petitioned for writ of certiorari on that claim. *See Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (state procedural rules cannot arbitrarily preclude jurisdiction of Supreme Court).

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other constitutional challenges had been heard in state court. Thus, the application of the rule Gosch seeks now would unfairly penalize the state for the Court of Criminal Appeals' and state habeas courts' conscientious performance of their duty.

C. *In the alternative, if considered on its merits, Gosch's claim that his execution at this time would constitute "cruel and unusual" punishment is without merit.*

The Supreme Court has interpreted the Cruel and Unusual Clause of the Eighth Amendment to prohibit "those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. at 405, 106 S.Ct. at 2599. In addition, the Supreme Court has interpreted the Cruel and Unusual Clause to prohibit punishment that offends the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598 (1958) (plurality opinion). In determining what standards have "evolved" the Supreme Court has looked to the standards of "modern American society as a whole." *Stanford v. Kentucky*, 492 U.S. 361, 369, 109 S.Ct. 2969, 2975 (1989). *See also Harmelin v. Michigan*, 111 S.Ct. 2680, 2691-92 (1991). Although Gosch places substantial reliance on the standards of other countries, the Supreme Court has emphasized that it "is *American* standards of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant." *Stanford v. Kentucky*, 492 U.S. at 369 n.1, 109 S.Ct. at 2975 n.1 (emphasis in original). To this end, the determination of what constitutes cruel and unusual punishment is "'informed by objective factors to the maximum possible extent.'" *Id.*, 492 U.S. at 369, 109 S.Ct. at 2975, *quoting Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861 (1977). The "evolved standards" thus prohibits "particular forms or 'modes' of punishment--specifically, cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 111 S.Ct. at 2691.

Gosch cannot demonstrate that his execution at this time would have been considered cruel and unusual at the time the Bill of Rights was adopted nor that it would be a cruel method of punishment that is not regularly followed at this time. Gosch death sentence was assessed on January 26, 1984. The trial court could not set an execution date until 1987 because Gosch's direct appeal was pending.[5] Tex. Code Crim. Proc. Ann. art. 42.04 ("When a defendant is sentenced to death, no date shall be set for the execution until after the receipt by the clerk of the trial court of the mandate of affirmance of the court of criminal appeals.").

1. Gosch's execution does not offend contemporary standards of what constitutes cruel and unusual punishment.

Beginning with the Supreme Court's contemporary standard for determining what constitutes cruel and unusual punishment, the delay occasioned while a condemned prisoner pursues direct appeals and collateral relief is not considered cruel or unusual by present standards. At least two United States Courts of Appeals have decided this claim have determined that a more than fifteen-year delay between sentencing and execution does not constitute cruel and unusual punishment. *See Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (rejecting claim that to execute death sentenced petitioner after pursuing appeals and collateral relief for sixteen years is cruel and unusual), *rev'd on other grounds*, 113 S.Ct. 528 (1992) (conviction reversed without prejudice to state's right to seek another death sentence); *Free v. Peters*, 50 F.3d 1362 (7th Cir.) (rejecting claim that to execute death sentenced inmate after pursuing appeals and collateral relief for approximately two decades is cruel and

[5] The Supreme Court denied certiorari review on March 23, 1987. *Gosch v. Texas*, 480 U.S. 940 (1987). Gosch's petition for rehearing was denied on May 4, 1987. *Gosch v. Texas*, 481 U.S. 1043 (1987).

unusual), *cert. denied*, 514 U.S. 1034, 115 S.Ct. 1397 (1995). *See also White v. Johnson*, 79 F.3d 432; *Lackey v. Scott*, 83 F.3d 116.. The approximate eleven years Gosch has spent challenging his conviction and sentence would *a fortiori* would not be unconstitutionally cruel and unusual.

Moreover, due to the added procedural protections in place for those convicted of capital punishment, it is certainly the exception rather than the rule that a death sentence is carried out in less than ten years from the time of sentencing. *See, e.g., Sawyer v. Whitley*, 112 S.Ct. at 2517 (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *McClesky v. Zant*, 111 S.Ct. 1454 (1991) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Harris v. Pulley*, 493 U.S. 1051 (1990) (previous opinion, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871 (1984), demonstrates death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320 (1988) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (denying claim that to execute death sentenced petitioner after pursuing appeals and collateral relief for 16 years is cruel and unusual), *rev'd on other grounds*, 113 S.Ct. 528 (1992) (conviction reversed without prejudice to state's right to seek another death sentence); *Free v. Peters*, 50 F.3d 1034 (rejecting claim that to execute death sentenced inmate after pursuing appeals and collateral relief for approximately two decades is cruel and unusual).

Gosch cannot attribute blame to the Court of Criminal Appeals for the time required to determine his direct appeal. Initially, it is important to note that most states with the death penalty provide for a mandatory appeal to the state's highest court. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic

appeal of all death sentences to the State's Supreme Court."); *Pulley v. Harris*, 465 U.S. at 43 n.7 (noting Georgia statute *requiring* State Supreme Court to conduct proportionality review "much copied"). The automatic appeal for death sentenced convicts provided in Texas was obviously implemented to provide direct access to the Texas' highest court for criminal matters without the necessity of petitioning for discretionary review as required for non-capital offenses. *See and compare* Tex. Code Crim. Proc. Ann. art. 37.071(h) and Tex. R. App. Proc., Rule 200 *et seq.* The fact that capital offenders have direct access to the Court of Criminal Appeals, does not mean that Gosch was required to file an appeal brief or raise the issues that he did. *Cf., Lott v. State*, 874 S.W.2d 687 (Tex.Crim.App. 1994) (conviction and death sentence reviewed for fundamental error because no brief filed on appeal; opinion issued in less than one year after submission).

Assuming *arguendo* that Gosch has a constitutional right to an expeditious review of his conviction and sentence, his active challenge to his conviction and sentence is in conflict with such a right. He cannot, on the one hand, assert various difficult issues on appeal and in a series of petitions on collateral review, and on the other, claim that he is entitled to expeditious resolution of those claims. In this regard, such a right would conflict with the right to be heard on his substantive claims. *Cf., Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968) (delay of eight years between arrest and sentencing did not violate defendant's constitutional right to a speedy trial where the delay resulted from the need to assure careful review of an unusually complex case). Criminal defendants are frequently called upon to choose between two competing rights. *See, e.g., Battie v. Estelle*, 655 F.2d 692, 701-02 (5th Cir. 1981) (right of defendant to present psychiatric testimony constitutes a waiver of defendant's Fifth Amendment privilege against self-incrimination for unwarned statements made to

state's psychiatrist in same manner as would defendant's election to testify). *See also Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975) (although criminal defendant must be afforded assistance of counsel, he is also entitled to represent himself). Thus, even assuming a right to an expeditious appeal exists, which the Director denies, Gosch's assertion of his claims on appeal weighs heavily against any fault of the state for taking the time to conscientiously decide the claims.

In addition, the fact that Gosch has previously had to prepare for an execution does not itself rise to the level of cruel and unusual punishment. The Court addressed a similar issue in *State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S. at 464, 67 S. Ct. at 376; *see* Section A(1), *supra*. The mere fact that Gosch was able to block previously scheduled executions through legal channels certainly does not give rise to a claim that the scheduling of those executions constitutes cruel and unusual punishment. Thus, Gosch cannot demonstrate that his execution would be considered cruel and unusual by contemporary standards, either because of the time taken to resolve his claims on direct appeal and collateral review or because he has previously had to prepare for execution.

2. Gosch cannot demonstrate that his execution would have been considered cruel and unusual at the time the Bill of Rights was adopted.

Gosch also cannot demonstrate that the delay occasioned by his pursuit of appeals and collateral relief would have been considered cruel and unusual punishment at the time the Bill of Rights was adopted. While Gosch may accurately assert that it would not have taken near the amount of time to carry out death sentence at the time the Bill of Rights was adopted as it does today, he in no manner demonstrates that the reasons for the swiftness with which executions were previously carried out had anything to do with the conceptions of cruelty to the condemned. *See Pratt & Morgan*,

slip op. at 2 (discussing swiftness of carrying out executions in eighteenth- and nineteenth-century England, but not discussing reasons). Contrary to Gosch's assertions, the procedures to which Gosch has been subject, which has allowed him to attack his conviction on direct appeal and in collateral proceedings, exhausting every imaginable claim at the expense of the state, are quiet generous by the standards employed at the time the Bill of Rights was adopted.[6] *See, e.g., Ford v. Wainwright*, 477 U.S. at 406, 106 S.Ct. at 2600 (noting "sparing humanitarian concessions of our forebears"). Gosch has therefore provided no basis to conclude that his execution would have been considered cruel and unusual at the time the Bill of Rights was adopted.

D. Allowing the avoidance of an execution due only to the amount of time spent pursuing unsuccessful appeals would itself be arbitrary and capricious.

As recognized in *Richmond v. Lewis*, 948 F.2d at 1491-92, allowing death-sentenced inmates, who have the most complex issues on appeal and lawyers most skillful at dilatory tactics,[7] to avoid a death sentence due to the delay thus created would itself be arbitrary and capricious and, therefore, unconstitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972). *Richmond v. Lewis* bears quoting in this respect.

> It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the

---

[6] For example, at the time the Bill of Rights was adopted, criminal defendants were not entitled to an appeal or appointment of counsel at trial, much less the appointment of counsel on appeal and collateral review.

[7] It cannot be doubted the dilatory tactics in capital cases are not regularly and skillfully employed. Numerous courts have commented on the practice. For example, in *Evans v. Bennett*, 440 U.S. 1301, 1307, 99 S.Ct. 1481, 1484 (1979), Justice Rehnquist ordered counsel to provide a detailed account as to why he waited until approximately one week prior to his client's scheduled execution to file a petition and then explained

> merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, *death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates--less successful in their attempts to delay--would be forced to face their sentences.* Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last line of appeals fails on the merits.

Richmond v. Lewis, 948 F.2d at 1473(emphasis added). No reason exists to allow death sentenced inmates to benefit from the unsuccessful pursuit of appeals.

Finally, Gosch has not made a substantial showing that he has been denied a constitutional right. Therefore, he is not entitled to neither a stay of execution nor habeas relief.

IV.

GOSCH IS NOT ENTITLED TO A STAY OF EXECUTION.

Gosch is not entitled to a stay of execution, because he cannot demonstrate a substantial denial of a constitutional right that would become moot if he were executed. *See Barefoot v. Estelle*, 463 U.S. 880 (1983). Moreover, where, as here, a petitioner attempts to manipulate the system by filing a last-minute request for stay of execution, the equities favor the respondent and may disentitle the petitioner to a stay of execution. *See Gomez v. United States District Court of the Northern District of California*, 503 U.S. 653 (1993).

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

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No. 97 7521
A-511

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

LESLIE LEE GOSCH,
Petitioner,
v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

PROOF OF SERVICE

I hereby certify that on the 15th day of January, 1998, one copy of Respondent's Brief in Opposition was faxed to Raoul Schonneman, Maurie Levin, 205 West 9th Street, Suite 201, Austin, Texas, 78701. All parties required to be served have been served. I am a member of the Bar of this Court.

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ATTORNEY FOR RESPONDENT

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

RECEIVED
JAN 15 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

MOTION FOR STAY OF EXECUTION

Petitioner Lesley Lee Gosch, an indigent, respectfully moves this Court to stay his imminent execution, presently set for January 15, 1998, at 6:00 p.m. CDT. The grounds in support of this Motion are set forth fully in Mr. Gosch's Petition for Writ of Certiorari, filed herewith.

Respectfully submitted,

MAURIE LEVIN*
Texas Bar No.00789452
Member, Supreme Court Bar

RAOUL SCHONEMANN*
Texas Bar No. 00786233

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Stay of Execution was served on counsel for Respondent by facsimile transmission to: Michael Skotnik, Capital Litigation Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, 512-320-8132, this 15th day of January, 1998. I further certify that all parties required to be served have been served.

97-7521

No. 97-7521 (A-511)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

RECEIVED
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SUPREME COURT, U.S.

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE:
Mr. Gosch is scheduled to be executed January 15, 1998, at 6:00 p.m.

* **Maurie Levin**
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Attorneys for Petitioner Lesley Lee Gosch
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16 pp

ORIGINAL QUESTIONS PRESENTED

1. Whether Congress' enactment of the Antiterrorism and Effective Death Penalty Act of 1996 preempts the State of Texas from setting an execution date that abbreviates the statute of limitations period and expedites the process of federal habeas review of a capital petitioner's first federal habeas petition?

2. Whether the State of Texas can circumvent Congress' explicit decree that only states that provide adequate post-conviction procedures and representation are entitled to expedited review of a death-sentenced prisoner's first federal habeas petition, simply by setting an execution date that accomplishes the same end?

3. Whether the State of Texas denies capital habeas petitioners their constitutional due process right of access to the courts by scheduling execution dates prior to initiation or completion of non-successive federal habeas proceedings?

4. Whether a state forfeits its right to carry out a death sentence if state officials, acting with deliberate indifference or malice, subject a condemned inmate to various types of extreme psychological torture, including preparations for repeated unnecessary execution dates, during his eleven-year stay on death row?

5. The federal district court denied petitioner's request for an evidentiary hearing, thereby preventing him from developing his factual allegations of unconstitutional punishment, and held that those allegations, even if true, did not constitute a violation of the Eighth and Fourteenth Amendments. Should this Court grant certiorari, vacate the decision of the court below, and remand for a full and fair evidentiary hearing?

SUPPLEMENTAL QUESTIONS PRESENTED

1. **Whether the Court of Appeals conducted a fundamentally adequate review of Petitioner's non-successive habeas corpus petition consistent with the statutory scheme enacted by Congress, when no member of the panel reviewed the state court record or the record of the state habeas evidentiary hearing, the petition is not frivolous on its face, and the Court of Appeals' cursory and conclusory opinion is entirely devoid of reasoned analysis of any of Petitioner's claims for relief?**

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, issued less than an hour ago, is unpublished. A copy of the slip opinion is attached as Appendix A.

ADDITIONAL REASONS FOR GRANTING CERTIORARI

This case is a tragic example of how willing federal habeas courts, particularly those with jurisdiction over Texas death penalty cases, have become to deny death row inmates even a single meaningful habeas corpus appeal of their death sentences and convictions. As this Court is fully aware, this is not the first such example in a Texas post-conviction capital appeal.[1] But it surely is the most egregious example. If Mr. Gosch's execution takes place within the next hour and a half, it will surely be after one of the most cursory reviews conducted by the federal courts of a death-sentenced inmate's non-frivolous constitutional claims in the post-Furman era.

More than a decade ago, in Barefoot v. Estelle, 463 U.S. 880 (1983), the Fifth Circuit and this Court approved of expedited procedures for the Fifth Circuit's review of a district court's denial of habeas relief in a capital case when a certificate of probable cause was granted by the district court. During the mid-1980s and early 1990s, this Court went further to restrict federal habeas corpus review in other areas, by strictly enforcing its non-retroactivity, procedural default,

[1] See, e.g., Marcia Coyle, *The 33-Hour Habeas Appeal*, NATIONAL LAW JOURNAL, February 3, 1992, at 3 (discussing the case of Texas death row inmate Michael Clark); see also Clark v. Collins, 956 F.2d 68, 69-70 (5th Cir. 1992); Clark v. Collins, No. 92-2036, slip op. (5th Cir. January 16, 1992) (originally designated to be published), depublished, 953 F.2d 642 (5th Cir. 1992). Judge Davis dissented on the grounds that "I am unable to adequately assess Clark's claim of ineffective assistance of counsel without reviewing the pertinent portions of the trial record, which are not now available to me." Slip. Op. at 7.

and abuse of the writ doctrines.[2] Barefoot, Teague, and McCleskey -- all of which have received a tremendous amount of criticism[3] -- were one thing; what went on in the lower courts in this case is an entirely different matter. Under no reasonable construction of the role of federal habeas corpus review can the extraordinarily cursory review by the courts below be deemed fundamentally adequate.

In what is a remarkably short, perfunctory, and wholly conclusory opinion by any standard, the United States Court of Appeals for the Fifth Circuit denied Mr. Gosch all relief within the past hour despite the fact that his Application for Certificate of Appealability has been pending in the Court for less than a day. The Court of Appeals' opinion fails to address in any considered way any of the facts or substantial evidence specific to Mr. Gosch's claims for relief. The reason for this is apparent: According to the dissenting opinion of Judge Garza, **none of the members of the panel have even reviewed the record of the three-day evidentiary hearing that was conducted in state court**. *Gosch v. Johnson*, No. 98-40042, slip op. 6 (Garza, J., dissenting). Bravely, Judge Garza has declared what would be obvious to any reasonable jurist who reviewed Mr. Gosch's federal petition: that his claims for relief -- which include a claim of ineffective assistance of counsel based on the undisputed fact that, due to trial counsel's

[2] See, e.g., Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality); Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Teague v. Lane, 489 U.S. 288 (1989); McCleskey v. Zant, 111 S.Ct. 1454 (1991); Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).

[3] See, e.g., Judge Donald Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1013 (1993); Chief Judge Gilbert Merritt, *Access to the Federal Courts in Habeas Corpus Cases*, 58 TENN. L. REV. 145 (1990); Anthony Amsterdam, *In Favorim Mortis: The Supreme Court and Capital Punishment*, HUMAN RIGHTS, Winter 1987, at 14, 53-54; Nancy Levitt, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55 (1990); Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991).

inexcuseable negligence, defense testing of forensic review actually produced critical inculpatory evidence that was introduced by the prosecution against Mr. Gosch at trial -- are not frivolous. Under these circumstances, well-established federal law requires that a stay issue and that "reflective study and analysis" be conducted by a federal court.

The federal court's cursory review cannot possibly be squared with the Antiterrorism and Effective Death Penalty Act of 1996. Not even the "expedited procedures" contained in Chapter 154 of the Act -- for which Texas, according to the Fifth Circuit, does not even qualify -- would afford Mr. Gosch such perfunctory review. It is impossible to comprehend how the Fifth Circuit was able to reach any conclusion as to the "reasonableness" of the state court's findings when Judge Garza's revelation that none of the panel members have even read the state court record is undisputed.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. At the very least, this Court should stay Petitioner's imminent execution pending the disposition of this petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 15 1998
CHARLES R. FULBRUGE III
CLERK

No. 98-40042

LESLEY LEE GOSCH,

Petitioner,

versus

GARY JOHNSON, Director,
Texas Dept. of Criminal
Justice, Institutional Division,

Respondent.

Appeal from the United States District Court
for the Southern District of Texas
(CV-97-126)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that petitioner's application for Certificate of Appealability (COA) from the district court's denial of his petition for writ of habeas corpus is hereby denied and his appeal is hereby dismissed; and his petition for stay of execution is likewise denied.

Although the instant appeal, application for COA, and petition for stay of execution have just been filed in this court, this

panel has been tracking petitioner's direct and collateral appeals in state and federal court for years, most recently those in the federal district court for the Southern District of Texas, having timely received and carefully reviewed all filings of petitioner, respondent, and the district court, when and as filed. As such, we are intimately familiar with the facts and law, the arguments of the parties, and the rulings of the district court and its reasons therefor. Consequently, petitioner's eleventh hour filings in this court do not place us in a position of requiring more time than remains before petitioner's scheduled execution in which to make considered determinations and rulings on the matters now before us.

For the reasons set forth by the district court in its extensive explications in its Order filed January 12, 1998, and its subsequent rulings, we agree that the standard of review to be applied here is that set forth in 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), particularly subsections (d)(1) and (d)(2).[1] Our study of the

[1] (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in State court proceedings. (emphasis added) (West Supp. 1997).

careful and exhaustive analysis of the district court in its ruling denying habeas relief and dismissing the petition satisfies us that petitioner's claim was "adjudicated on the merits" in State court proceedings and that the resulting decisions were not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The overwhelming evidence of guilt in this case indicates that the petitioner planned to kidnap the victim and extort a significant monetary ransom from her husband and that the petitioner murdered the victim in her home by shooting her in the head six times. No claim of factual innocence of the petitioner in this 1985 murder is even remotely suggested. All of petitioner's many claims made in these proceedings, which have dragged on for over eleven years, have been rejected — and correctly so. In this last effort for relief, we perceive the petitioner's claims to be meritless on their face.

First, the petitioner claims that his execution would violate the Eighth Amendment's prohibition against cruel and unusual punishment in light of the three previous dates the State set for carrying out the petitioner's capital sentence. The petitioner alternatively argues that the length of his stay on death row — over eleven years — constitutes cruel and unusual punishment entitling him to relief. But the petitioner's challenges under the

Eighth Amendment do not affect the validity of his conviction or sentence and they are thus not cognizable as a basis for relief under federal habeas corpus. 28 U.S.C. § 2254 (Supp. 1996). Furthermore, the relief that the petitioner seeks is barred by the principles enunciated in Teague v. Lane, 109 S.Ct. 1060, 1075 (1989).

Next, the petitioner asserts that his counsel rendered ineffective assistance during the guilt phase of his trial. Strickland v. Washington, 104 S.Ct. 2052, 2065-68 (1984). The state court correctly determined, however, that the petitioner failed to demonstrate any prejudice resulting from his counsel's allegedly deficient investigatory and trial tactics. Strickland, 104 S.Ct. At 2068 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.").

Finally, the petitioner alleges that the State elicited false testimony at the trial and knowingly allowed such testimony to stand in violation of the precepts set out in Giglio v. United States, 92 S.Ct. 763, 766 (1972), and Brady v. Maryland, 83 S.Ct. 1194, 1197 (1963). To obtain relief under Giglio, the petitioner must demonstrate (1) that the testimony was false; (2) that the government knowingly offered the false testimony; and (3) that the false testimony was material, that is, that "it is reasonably likely that the truth would have affected the outcome of the trial." Id. Without addressing whether the petitioner has established the first two prongs, he has failed totally to

demonstrate the materiality of the allegedly false testimony. Therefore, each of the petitioner's claims for relief lack any possible merit.

Petitioner's post-AEDPA petition seeking habeas relief was properly denied. Moreover, for purposes of COA, petitioner has failed to make a "substantial showing of the denial of a constitutional right," i.e., the issues presented are not debatable among jurists of reason, so petitioner has failed to justify issuance of a COA as well.

IT IS FURTHER ORDERED that, considering the foregoing denial of petitioner's application for COA, his petition for stay of execution is denied. The merits of his petitions for a writ of habeas corpus and for a stay of execution have not presented a substantial case; neither have they made a substantial showing of the denial of a federal right.

COA DENIED; APPEAL DISMISSED; STAY OF EXECUTION DENIED.

EMILIO M. GARZA, Circuit Judge, dissenting:

This matter, reviewed and decided in less than a day, is a prime example of the tail of a pending execution wagging this panel's dog.[1] Although I agree that a preliminary review of Gosch's habeas application and motion for a stay of execution suggests that it lacks merit, this court should be more reticent in deciding any death penalty case so quickly—especially one in which the merits have not been previously reviewed by an appellate court. A thorough and comprehensive review of the record, the briefs, and, in my opinion, oral argument, is required after the passage of AEDPA.

Clearly we have violated Chief Justice Rehnquist's admonition that "Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution." *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal at 6 (Aug. 23, 1989) (retired Justice Powell presiding); *cf. McFarland v. Scott*, 512 U.S. 849, 857-58 (1994) (appointment of counsel on the eve of an execution date "would have been meaningless" unless the

[1] While the majority opinion is correct that we have been tracking Gosch's direct and collateral appeals in state and federal court for several years, *see McFarland* v. Scott, 512 U.S. 849, 852 n.1 (1994) (discussing Gosch's previously filed "skeletal" habeas petition and previous Texas policy in death penalty cases), none of the panel members, to my knowledge, have reviewed the state court record or state habeas evidentiary hearing in light of issues number 2 and 3, Gosch's ineffective assistance of counsel and his false testimony claim.

execution was stayed; "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims."). This case is not frivolous. At a minimum, issues number 2 and 3—whether Gosch received ineffective assistance of counsel and whether the State knowingly permitted false testimony—require thorough review of the underlying record. *See Mercer v. Armonstrout*, 864 F.2d 1429, 1431-32 (8th Cir. 1988) ("If the petition is not frivolous on its face, *the very essence of this court's duty is to study and research the points raised.* The severity and finality of the death penalty requires the utmost diligence and scrutiny of the court. . . . No judge can digest, retain, or apply these principles to a voluminous state court record without reflective study and analysis. To suggest that a life or death decision can be made by simply reading a petition is to advocate dereliction of judicial duty.") (emphasis in original).

I would, therefore, grant the stay of execution and hold in abeyance any ruling on a COA until a thorough review of the record is performed in light of the specific issues before us.

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Supplement to Petition for Writ of Certiorari was served on counsel for Respondent by facsimile transmission to: Michael Skotnik, Capital Litigation Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 15th day of January, 1998. I further certify that all parties required to be served have been served.

Raoul Schonemann

SUPREME COURT OF THE UNITED STATES

LESLEY LEE GOSCH *v.* GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97–7521. Decided February 23, 1998

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, respecting the denial of the petition for writ of certiorari.

Although my vote is to deny certiorari, I add this further word on the earlier order staying petitioner's execution, for which I also voted. 522 U. S. ___ (1998). One consideration bearing on a decision to order a stay is the prospect for relief if the case should be taken for review. *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). Although the stress placed on this factor assumes, of course, that this Court can adequately make such an assessment, the peculiar circumstances of this case made it unusually difficult for me to come to any confident judgment about possible entitlement to relief in the short time of some 90 minutes between our receipt of the ruling of the Court of Appeals and the time then set for petitioner's execution. This was so in part because the grounds for relief raised by petitioner included claims under *Strickland* v. *Washington*, 468 U. S. 668 (1984), and *Giglio* v. *United States*, 405 U. S. 150 (1972), on each of which there were potential evidentiary issues dependent on a state court record, subject to conditional deference by the District Court under 28 U. S. C. §2254(e). My own difficulty reflected disagreement within the Court of Appeals over the adequacy of less than a day's time (instead of the normal briefing and argument period) for that court to review the soundness of

the District Court's reliance on the state court evidence and findings. Given the importance of adequate review on a first (and, presumably, only) federal habeas petition, I voted to stay the execution to allow further time to examine claims coming to us in such unusual circumstances.